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# *From Kautokeino to a Nordic Sami Convention: An Overview on Sami and Indigenous Peoples' Rights*

Relatore  
Prof. Giovanni Poggeschi

Laureando  
Elena Baggio  
n° matr. 1109547/ LMLCC

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Second, I would like to thank Alexandra Tomaselli of the EURAC Research Centre for always being so kind and willing to help students and researchers interested in the topic, and for helping me in both my bachelor and master thesis. I wish her a successful career and a bright future.

Third, I would like to thank the Finnish professors and researchers who I contacted during the research phase, Lotta Kokkonen, Maritta Stoor-Lehtonen, and Lydia Heikkila. Their kindness and passion in helping young people has been highly appreciated. A special thank, in particular, to Lotta: I still remember attending her course in Jyväskylä, during my stay in Finland, as one of the sweetest moments, thanks to her cheerfulness and devotion to the students.

Finally, I would like to thank my parents and my closest friends, who have always had kind words of encouragement (and a whole lot of patience) to offer unconditionally through the months spent writing this thesis.



# Introduction

The protection of the endangered rights of minorities and indigenous peoples around the world. The implementation measures to equally ensure such rights without prevailing on the national domestic law. The evolution of international law and its passing from being a tool of colonialism to a powerful weapon of self-defence for the indigenous communities. The methods for reparation that many international documents advocate for the violations of human rights in detriment of those discriminated fringes of society. All these topics have been abundantly discussed by legal experts and pondered by NGOs, national authorities and governmental bodies throughout centuries, due to their relevance for fundamental human rights. And it was exactly because of the global importance and pertinence of such legal topics in the current events that I decided to make them the centre of my thesis.

In the last years, my interest in the indigenous matter has grown considerably, mainly thanks to two factors: the first one is the main subject of my bachelor thesis<sup>1</sup>, and the second one was the meeting with two experts on the topic who shaped my enthusiasm for the discipline. As for the first reason, I decided to focus on the indigenous matters and on a South American tribe (los machiguengas) in my previous work, but with a cultural and literary twist instead of directing my research towards legal aspects. As I was reading about this endangered population, very similar under many aspects to the Sami people of Scandinavia, the issue of lack of human rights protection and the international businesses meddling with the indigenous traditional life captured my attention to a greater extent than the other legal fields. As for the second reason, I had already attended international law courses during my university years, being drawn more towards global relationships between nation-states rather than domestic and private law, but the course that definitely confirmed my will to investigate more was professor Poggeschi's course on comparative international language law. The topic fascinated me since the first lesson, and through the textbook I came across the Sami people's case. I had already had the pleasure to share ideas with professor Poggeschi on

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<sup>1</sup> Baggio, Elena. *Dialettalismi machiguenga in El hablador di Vargas Llosa: un esempio di traduzione (cap. III)*, Università degli Studi di Padova, 2014/15.

the indigenous peoples' issue when he kindly suggested some sources that I could check for my bachelor thesis, and attending his course on language rights turned to be (as well as extremely interesting and pleasant) a good base for the specific terminology used in the sources I have chosen for this dissertation. In addition, he introduced me to Alexandra Tomaselli, a researcher on minority rights at the EURAC Centre of Bozen, who was so kind and helpful and in turn put me in contact with other researchers and professors working and studying on this field.

However, another fundamental and decisive factor stepped in and contributed to delineating the reasons why I chose the Sami people as the focus of my thesis: my Erasmus stay in Jyväskylä, central Finland. During the five months I have been spending in the Nordic country, I first had the amazing opportunity to visit Lapland and to experiment some of the many activities characterizing the Sami people's daily life. In addition, during one of the courses I attended at the Jyväskylän yliopisto (University of Jyväskylä), my class had the most unique of meetings: a Senior Lecturer in Speech Communication of Sami origins, Maritta Stoor-Lehtonen. Instead of coming to lecture us on language and communication, she came on Lotta Kokkonen's<sup>2</sup> request to show us part of her fascinating exotic (for the present author, at least) culture. She brought with her some colourful traditional Sami clothes, musical instruments and everyday handmade wooden tools (knives, small pouches, books, stationery), but she also delighted us by chanting a traditional *yoik*<sup>3</sup> accompanying herself with a Sami drum. Sometimes, apparently simple contacts with different cultures are enough reasons to be fascinated and make us desire to investigate more on the topic. Maritta Stoor-Lehtonen was also so kind and helpful to later, once back to Italy, suggest some sources I could use to write this dissertation.

Out of all the sources I have been reading to better comprehend the indigenous issue, I selected only some of them, in order to be sure to form a solid coherent basis without the risk of inserting too many different voices in the same issue. The authors that most contributed in shaping the guidelines of the final work are Federico Lenzerini, Mauro Mazza, and S. James Anaya. Slimming down the remarkably abundant quantity of

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<sup>2</sup> Lecturer in Finnish speech communication at Jyväskylän yliopisto, Jyväskylä, Finland.

<sup>3</sup> Traditional Sami *a cappella* chant, often *impromptu*, whose lyrics express the essence of a person or a place.

information available on the topic –ranging from social, cultural topics to political, economic and legal aspects- has arguably been the hardest task along the process. Once settled the main concepts, I decided to divide my work into three Parts and 6 Chapters, preceded by an Introduction.

- *Part I* offers, in Chapter 1, some clarifications useful on the terminology used in the sources and in this dissertation and presents a general overview on the topic (human right discipline; difference between minorities and indigenous peoples; the concept of self-determination and autonomy; Polar Law; the most relevant international indigenous institutions and treaties). In Chapter 2, a description of the most significant features characterizing the Sami people is provided, with a focus on those related to the topics touched in the following chapters.
- *Part II* is based on the historical analysis of some of the most noteworthy events related to the indigenous populations' fight towards the recognition of their claims. Chapter 3 includes the historical events of the past centuries (from the colonial period to modern age), while Chapter 4 concentrates on the contemporary phase.
- *Part III* is marked by the political measures and national policies that are under way in the future years (Chapter 5) and a concise list of personal remarks on the topic (Chapter 6).

In addition, all of the parts of the dissertation are interconnected but at the same time independent, so that its structure can be used in two ways. First, excluding Part I, Part II and Part III can be read in a chronological order, so that a reader interested in the historical events that led to the development of international law and the global battles involving the indigenous peoples and the nation-states can read them in a consecutive order and obtain a whole historical review. On the other hand, Part II and Part III can be also read independently by choosing the analysis of a specific period. In all cases, Part I is recommended to be read first, due to the term clarifications that it contains –useful to understand the notions in the following chapters.



This thesis purposely draws the reader's attention towards specific sub-topics, due to its compulsory concise length. Furthermore, this is also part of its aim, which targets specific political and historical aspects of the Sami people' and of the other ethnic communities' condition: this overview is meant to furnish basic information to a reader who has little theoretical knowledge on minorities' rights and on the Sami people in particular; its general nature embracing a great deal of sub-themes was therefore preferred to be more easily accessible for a wider range of readers. Particularly, I also chose the Sami people as a "pioneer" for my analysis due to their noteworthy achievements in the rights' recognition field, and for their unique status of transnational minority divided into more than one country.

Finally, the bibliography and website citations list at the end of the dissertation will help the reader increase his or her knowledge on a wide variety of topics and meet his or her curiosity on such a controversial yet always actual issue of our modern society.

# PART I

## Chapter 1

Hundreds of laws, regulations, statutes, decrees, and orders are set to be outlined, drafted, debated over and finally given formal legal approval on the daily political agenda of European and non-European nations. This conspicuous legal production involves every legal aspect of our modern society, as well as the human rights field. Without any doubt, human rights can be unanimously considered as the most basic and inalienable of all typologies of rights, which every individual should be entitled to; this is the reason why, before proceeding to a deeper analysis of the minorities' and indigenous peoples' rights that will be offered in this dissertation, some preliminary observations should be made on the dimension of human rights.

The essay by Giorgio Agamben about Hannah Arendt's<sup>4</sup> view on the link between the rights of man and the nation-state can be a valid example of reflection on the protection of human rights throughout historical events. Agamben starts with a political-historical background, in order to clearly mark the point in which the view on the individual radically changed. The main distinction introduced by the author is between the *ancien régime* and the *nouveau régime* and how the inherent meaning of the concept of nativity assumed a new ground-breaking power with the coming of the latter. Following the end of the Second World War, a rapid increase of declarations and agreements concerning the human rights field was registered, along with a big interest on the part of the international organisations on the issue. As the author states in the second chapter<sup>5</sup>, "Declarations of rights represent the original figure of the inscription of natural life in the juridical and political order of the nation-state"<sup>6</sup>, meaning that the once neutral and God-given status of the bare life condition entered the state's definition of sovereignty and became its fundamental basis. And as the main and most important Declaration that can reasonably be considered as the foundation stone for this process, Agamben

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<sup>4</sup> Arendt, Hannah. *The Origins of Totalitarianism*, 1951 in Agamben, Giorgio, *Homo Sacer I*, § 2, "Biopolitics and the Rights of Man".

<sup>5</sup> "Biopolitics and the Rights of Man".

<sup>6</sup> *Ibidem*.

proposes the *Déclaration des Droits de l'Homme et du Citoyen* [Declaration of the Rights of the Man and the Citizen] of 1789. In this document, the bare natural life, which means the actual fact of birth, becomes “the source and bearer of rights. ‘Men,’ the first article declares, ‘are born and remain free and equal in rights’ ”<sup>7</sup>, encouraging the following Declarations to follow these simple yet powerful guidelines. They strongly mark the shift from a sovereignty lying in a God-like monarch towards a national level, where birth and sovereignty merge in the same concept - creating a whole new equation between *sujet* and *citoyen*. The birth of the nation-state was completed.

Agamben also adds another important reflection on the role of the French Declaration and its giving native rights an inalienable status: it led to the creation of active rights and passive rights. According to Sieyès, whose quote is reported by Agamben in chapter 2<sup>8</sup> and that is also partly reported here:

Natural and civil rights are those rights *for* whose preservation society is formed, and political rights are those rights by which society is formed. ... All inhabitants of a country must enjoy the rights of passive citizens...all are not active citizens. Women, at least in the present state, children, foreigners, and also those who would not at all contribute to the public establishment must have no active influence on public matters. (*Écrits politiques*, pp. 189-206)

Here, natural and civil rights equate passive rights, while political rights equate active rights. As cited, the majority of the population should be able to enjoy passive rights, while only a minor percentage would be entitled to political active rights. Also, women, children, and foreigners -but also minor, criminals and insane- is explicitly denied the exercise of the rights belonging to this second category, thus they are not labelled as citizens. This may seem surprisingly inconsistent in comparison with what has just been said above on the content of the Declaration, but Agamben warns us to focus instead on the inner coherent biopolitical meaning; as he later states, “One of the essential characteristics of modern biopolitics (which will continue to increase in our century) is its constant need to redefine the threshold in life that distinguishes and separates what is inside from what is outside”. In other words, the very definition of sovereignty depends

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<sup>7</sup> Arendt, Hannah. *The Origins of Totalitarianism*, 1951 in Agamben, Giorgio, *Homo Sacer I*, § 2, “Biopolitics and the Rights of Man”.

<sup>8</sup> Sieyès, Emmanuel Joseph. *Écrits politiques*, pp. 189-206 in Agamben, Giorgio, *Homo Sacer I*, § 2, “Biopolitics and the Rights of Man”, pag.130

on borders that need to be continuously drawn by the ever-changing political and social dimension of the community, since the definition of *zōē*<sup>9</sup> itself enters politics through declarations and rights and deeply changes its own value.

To conclude on another historical note, Agamben highlights how this phenomenon, along with the relationship between nativity and nationality initiated by the French Declaration, showed signs of slowing down and lacking self-regulation by the time of the World War I outbreak. From this crucial moment on, after the Wilsonian self-determination notion and the Versailles Settlement, two contrasting circumstances took place; first, the nation-states started witnessing an increase in concern for natural life and the wide gap between lives dealing with politics or not; second, a gradually more frequent use of the rights of man used outside the context of citizenship, where it should belong, in opposition with the bare life status, whose interest was slowly being isolated and recodified into a new identity. Later, during the post-1989, human rights were also blown by the wind of change brought by the predominant liberal ideals, resulting in a decisive and conscious stress on minority individual rights instead of an interest in group-rights based lines of action<sup>10</sup>. How and how much these events had an impact on the actual situation of the human rights and of the work of international associations will be our focus for the next chapters.

### *1.1 Clarification on terminological issues*

Before moving on to a deeper insight into the specific range of human rights we are going to analyse here, a preliminary clarification on the terms implied is necessary.

The issue regards the difference between *minorities* and *indigenous people*. To begin with, the Longman Dictionary of Contemporary English<sup>11</sup> provides a basic distinction when taking into consideration the entries for *ethnic minority* and *indigenous*, whose definitions are respectively “a group of people of a different race from the main group

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<sup>9</sup> (Greek) “life”, here in the sense of “bare life”.

<sup>10</sup> Craig, Elizabeth. “Who Are The Minorities? The Role of the Right to Self-Identify within the European Minority Rights Framework”. *Journal on Ethnopolitics and Minority Issues in Europe*. Vol 15, No 2, 2016, 6-30. University of Sussex.

<sup>11</sup> Available at <http://www.ldoceonline.com/>.

in a country” and “indigenous people or things have always been in the place where they are, rather than being brought there from somewhere else”. The first difference that can be immediately noticed is in the substantial nature of the word *indigenous*, which can be referred not only to people but also to things. To enrich the definition of *minority* above, we can borrow Gurr and Scarritt’s words<sup>12</sup>:

Minorities are groups within larger politically-organized societies whose members share a distinctive collective identity based on cultural and ascriptive traits recognized by them and by the larger society. There are many possible bases for separate group identity: common historical experiences, religious beliefs, language, ethnicity, region of residence, and, in caste-like systems, traditionally prescribed occupations. Communal minorities , or *ethnies*, (we use the term interchangeably), usually are distinguished by several such traits. (Gurr, Scarritt)

The authors also suggest how to identify them: “[it] is not the presence of a particular trait or a combination of traits in a group, but rather the social perception that these traits ‘set the group apart’”; it also a fundamental characteristic of these perceptions that they are recognised and accepted by both the group members and the rest of the (larger) community<sup>13</sup>.

Looking for elements able to help us distinguish between minorities and indigenous peoples, some considerations by Poggeschi may be fruitful. While the minority groups, according to the author, tend to freely and willingly create and maintain relations with the dominant culture of the majority (but still insisting on protecting themselves from external cultural interferences), the indigenous peoples often look for a type of autonomy allowing them to remain separate, and detached, from the other majority *and* *minority* groups around them. In other words, indigenous communities value the conservation of their traditional lifestyle more than the intercultural interactions, although sincere.

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<sup>12</sup> Gurr, Ted Robert. Scarritt, James R. “Minorities rights at risk: A global survey”. *Human Rights Quarterly*, Vol. 11, No. 3 (Aug., 1989), pp. 375-405. The Johns Hopkins University Press

<sup>13</sup> Zook D.C., “Decolonizing Law: Identity Politics, Human Rights, and the United Nations”, in *Harvard Human Rights Journal*, 19, 2006. In Cukani, Entela. Discosola, Maria. Nicolini, Matteo. Poggeschi, Giovanni. *Rischi e potenzialità del dialogo costituzionale globale. Per la costruzione di un ‘itinerario’ geo-giuridico mediante la comparazione nel diritto pubblico*. Napoli: Edizioni Scientifiche Italiane, 2015

A definition of minorities and indigenous people can also be traced in Sara Memo's<sup>14</sup> work. In chapter 8, she began with describing the concepts of minorities and indigenous people as a "subtle continuum" sharing the feature of autochthony, in ostensible contrast with the fact that these two categories belong to two different legal fields concerning human rights. The author continues providing three extra features in common: both categories share a peculiar cultural heritage that are willing to protect and transmit and both are demographically inferior to a cultural majority present in the same territory. However, Memo also exposes a feature that characterizes indigenous people on the legal level: according to the Western doctrine, indigenous people, seen as ethnic communities that had occupied a certain territory before the arrival of colonialists, need special<sup>15</sup> protection in order to survive.

Last but not least, an element must be pointed out at this point that may result not as obvious as it should: surprisingly, regardless of their being defined as "minorities", in some countries these smaller groups precisely represent the majority of the population. As Poggeschi suggests<sup>16</sup>, Myanmar (Burma) is a good example to explain this phenomenon: choosing their lifestyle and their colonial past as the reference points, the majority of the population of Myanmar are to be considered as belonging to the indigenous category. On the contrary, from the point of view of distinguishing themselves from the other sectors of society that nowadays prevail in that territory, where they belong, only the ethnic minorities of Myanmar can then be defined as indigenous peoples.

To conclude with this brief overview on the differences between minorities and indigenous people, we are going to take Mauro Mazza's<sup>17</sup> work into account. In chapter 1, Mazza recalls what Memo stated in her dissertation: the condition of minorities is similar to the one of indigenous people, but indigenous people can put forward special

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<sup>14</sup> Sara Memo. *The Legal Status Of Roma In Europe: Between National Minority And Transnational People*. PhD dissertation. chapter 8, p. 281-282-283

<sup>15</sup> Specifically, land rights. This is due to the special link that ties indigenous people to their motherland.

<sup>16</sup> Poggeschi, Giovanni. *Rischi e potenzialità del dialogo costituzionale globale. Per la costruzione di un 'itinerario' geo-giuridico mediante la comparazione nel diritto pubblico*. Pg. 145. Napoli: Edizioni Scientifiche Italiane, 2015

<sup>17</sup> Mazza, Mauro. "Percorsi di ricerca sul diritto polare", *Quaderni*, pg. 47. Dipartimento di Scienze Politiche "Alberico da Rosciate", Jovene Editore, Napoli. 2011

claims since aboriginal settlers had lived in a specific territory before the coming of the colonisers<sup>18</sup>.

## *1.2 Definition of “indigenous people” and the pursue of self-determination*

Now that the terminological issues have been clarified, the following pages will present a broad overview on the social and political development of international law throughout the XX<sup>th</sup> century (a richer historical analysis will be offered in Part II, chapter 1, along with the political achievements that indigenous people and Sami reached) and an in-depth argumentation on how to define indigenous peoples and the pursue of self-determination according to eminent sources.

The structure and the instruments of international law as we know them now are the result of striking and remarkable changes that took place after the second half of the XX<sup>th</sup> century. Before that time, the *vis-à-vis* type of reciprocal action (concerning rights and obligations) between nations was based on the intercommunication on the same level. However, the birth of a new type of international human rights law led to its involvement in the fields of rights that had previously been an exclusive competence of internal jurisdiction. This process influenced the change in the perception of the term “individual” too: from being of exclusive pertinence of their state of citizenship, to receiving a certain degree of protection as “aliens” from the other states. The climax of this wave has still effects on today’s state political policies, which are supposed to protect not only human rights in general (within their jurisdiction) but also to investigate on and contrast violations of the internationally recognised individual and collective rights, and, in case, provide an adequate reparation. As Lenzerini succinctly captures:

In order to merge all these duties within a single and comprehensive concept, one can say that states have the obligation of realizing all requirements and conditions that are necessary and sufficient for ensuring effective and adequate enjoyment of internationally recognised human rights by all individuals and groups within their jurisdiction. (Lenzerini, Federico)<sup>19</sup>

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<sup>18</sup> About indigenous peoples’ and minorities’ autonomy claims, see M. Mazza, p. 53 and following.

<sup>19</sup> Lenzerini, F. 2008. *Reparations for Indigenous People. International and Comparative Perspectives*. Pgg. 3-4. Oxford University Press Inc, New York

As it has been outlined before, the gap between the two concepts of *minority* and *indigenous people* is surprisingly narrow yet decisive. Once outlined these differences, we are now going to target the indigenous level.

Ascertaining what the expression “indigenous people” means was, and still is, one of the most complex and controversial issues in the context of international legal order since the intromission of multi-level (internal and foreign) political interests into domestic jurisdiction, as stated above. Varied authors faced the subject in order to cast some light on this blurred terminology, with the following results.

Let us start with the generally accepted working definition prepared within the United Nations, more precisely by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities José R Martínez Cobo<sup>20</sup>:

Indigenous communities, peoples and nations are those which, having an historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors on the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

[Indigenous peoples are] composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a State structure which incorporates mainly the national, social and cultural characteristics of other segments of the population which are predominant.<sup>21</sup>

As highlighted in the Special Issue, “native lands” and “natural resources” are preponderant elements, according to the UN, to be incorporated into the notion of indigenous peoples. They also become some of the main key differences between

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<sup>20</sup> In “Study of the problem of Discrimination against Indigenous Populations”, UN Doc. E/CN.4/Sub.2/1986/7/Add 4, para 379, 1986 in Lenzerini, F. *Reparations for Indigenous People. International and Comparative Perspectives*. Pg. 18 Oxford University Press Inc, New York. 2008

<sup>21</sup> *Developments and Challenges of the UN Declaration on the Rights of Indigenous Peoples Five Years On: Insights on Biodiversity and Case Studies in Bangladesh, Brazil, Japan, and Uganda*. JOURNAL OF THE INDIGENOUS STUDIES NETWORK, Special Issue. Vol. XXIV, No. 4, pg. 19, Spring 2014.



indigenous peoples and minorities, as also seen in the previous pages. Lenzerini stresses this concept, again, in chapter 4<sup>22</sup>: on a theoretical point of view, the element in common between indigenous communities is their special and unique relationship with the earth and nature. This concept was also provided for in chapter 1<sup>23</sup> when mentioning the “consideration of indigenous peoples as the original sovereign entities over their ancestral lands, whose sovereignty, although hindered for centuries, has never completely expired”: this would be the primary origin and evidence for the “harmonic and holistic association based upon respect, interdependence and equilibrium” that characterizes indigenous peoples’ lifestyle, mindset and set of values. As a final remark, this extraordinary feature of indigenous peoples may be the reason why they are the most likely persons to address in order to draft new innovative and updated plans for the protection and the implementation of the biodiversity heritage -nowadays jeopardized by global warming, oil fever, deforestation, *et similia*.

Although a clear and seemingly in-depth definition of indigenous peoples has been provided by such an influential and authoritative source as the UN, the issue is much more complex and variable, and for this reason susceptible to quality inadequacy and content revision as the historical and socio-political events shape the path of minority and indigenous rights. The very fact that a fully unanimous agreement on the definition has not been reached yet should serve as a sufficient proof for this entangled situation and lead to a deeper reflection on wider horizons to encompass and alternative approaches to adopt. Since these criteria revealed themselves to be insufficient in terms of universal applicability, customary solutions should be taken into consideration, according to each case concerning each ethnic community as a separate unity (ex. Sami, Inuit, Ainu, etc).

Whilst trying to give a solid contribution to the international debate, Federico Lenzerini, one of the most eminent authors in the international field studies scene, also included in his edition of “Reparations for Indigenous People”<sup>24</sup> a clear and sufficiently exhaustive explanation of the terms implied in his work. Between chapters 1 and 4, he assembled a comprehensive and accurate list with the necessary requisites to delineate the

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<sup>22</sup> Lenzerini, F. *Reparations for Indigenous People. International and Comparative Perspectives*. Pg. 77 Oxford University Press Inc, New York. 2008

<sup>23</sup> *Ibidem*, pg. 11

<sup>24</sup> *Ibidem*. See ch 1

classification of ethnic communities. The criteria have been divided into objective and subjective elements and tailored according to the community in its collective connotation (objective) or the single individuals (subjective):

*Objective elements*<sup>25</sup>

- Preservation, protection and transmission by the members of the community of their peculiar cultural, religious, linguistic and political organisation (e.g. domestic and customary law) heritage;
- Historical and cultural connection with their traditional territories (but also a portion of them) on a pre-invasion and pre-colonial societies level;
- Occupation of the aforementioned traditional territories since a time preceding the invasions and the coming of the colonizers;
- Continuity of the communities involved in claiming said territories, even after been forcibly removed or transferred under the dominant territorial's government order.

*Subjective elements*<sup>26</sup>

- Self-inclusion<sup>27</sup> of the individual in the indigenous community;
- Acceptance of said individual in the community by the other members where he/she claims to belong.<sup>28</sup>

It is important to consider here that not all of the above-mentioned requirements must be satisfied for a person to be part of an indigenous community, but the individual concerned must meet at least some.

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<sup>25</sup> Basic elements to classify an ethnic cultural community.

<sup>26</sup> Subjective requisites to determine if an individual can be defined as “indigenous” (*ergo* “part of the indigenous community”).

<sup>27</sup> Self-identification is included in Art 1 para 2 of the ILO Convention No 169 on Indigenous And Tribal Peoples in Independent Countries “as a fundamental criterion for determining the groups to which the provisions of this Convention apply”.

<sup>28</sup> As can be easily noticed, these two subjective requirements consider an inner personal act from the individual (first case) and a communal act stance - how to establish the criteria for membership (second case).

After having analysed the issue of defining indigenous peoples and the criteria at the base of such definition, it is possible to meditate on another highly debated controversial topic, self-determination for minorities and indigenous peoples. The article by Joshua Castellino and Jérémie Gilbert can be useful as a first overview of the topic<sup>29</sup> to start our examination. As the authors express in their work, the right of self-determination places itself at the very base of rights as the most essential before any other. It is contained in Art 1 in two of the most important documents concerning the minorities' dimension, the *International Covenant of Civil and Political Rights* (ICCPR) and the *International Covenant Economic, Social and Cultural Rights*. So recite Art 1 and 2:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Before moving on with further observations, an agreement on the notion of self-determination must be reached. Unfortunately, as for the recognition of indigenous peoples, elaborating a precise and definitive entry seems to be a (almost) impossible task. In order to bring a partial clarification, Castellino and Gilbert also include a definition by Kingsbury:

[S]elf-determination has long been a conceptual morass in international law, partly because its application and meaning have not been formulated fully in agreed texts, partly because it reinforces and conflicts with other important principles and specific rules, and partly because the specific international law practice of self-determination does not measure up well to some of the established textual formulations<sup>30</sup>.

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<sup>29</sup> Castellino, Joshua. Gilbert, Jérémie. *Self-Determination, Indigenous Peoples And Minorities*. Macquarie Law Journal, Vol 3, pg. 155. 2003

<sup>30</sup> Kingsbury, Benedict, "Reconciling Five Competing Conceptual Structures of indigenous Claims in International and Comparative Law" (2001) 34 *New York University Journal of International Law and*

In this article, the authors then included Koskenniemi's considerations<sup>31</sup> from the historical standpoint. The origin of the concept of self-determination is to be detected in the Enlightenment period and in the following bloom of culture and knowledge spread, in the same political and intellectual atmosphere that shaped the revolutionary mindset of the period and eventually led to the French Declaration in 1789. According to Koskenniemi, the French revolution -but also the American insurgency- was the exact moment in which the concept started to acquire international significance.

The author then continues with the distinction between two different models of self-determination, respectively the classical and the secessionist. The first school of thought sees society as a group of people who rationally decide to form a society together and manage their self-determination through precise and established institutions and juridical instruments. Thus, according to the classical model of self-determination, the irrational part of primitive human nature is not contemplated, if not even negative and socially harmful. The primitive status of populations was then a virtue sacrificed for a higher form of social system, precisely entitling this social system as the only holder of the right of self-determination. On the contrary, the secessionist model considers the formal establishment of a society as less important than the concept of "nation"; the authenticity and the transmission of the community's will are more relevant than the efficiency of the institutions<sup>32</sup>, so that if a nation is entitled to obtain what is necessary for its members and rise up -and even take secession into account- in case this right is not granted. It can be argued that the statehood possess a higher political defining power only when it stands for and performs the community's identification.

It is precisely the second model, the secessionist one, the key element involved in such historical events described above. The subjugated communities, facing discontent with the government's insufficient (and, shortly after, totally lacking) efficiency in representing their will, raised up to claim and restore their undermined rights. The last

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*Politics* 189 in Castellino, Joshua. Gilbert, Jérémie. *Self-Determination, Indigenous Peoples And Minorities*. Macquarie Law Journal, Vol 3, pg. 156. 2003

<sup>31</sup> Koskenniemi, Marti. 'National Self-determination Today: Problems of Legal theory and Practice' (1994) 43 *International and Comparative Law Quarterly* 241 in Castellino, Joshua. Gilbert, Jérémie. *Self-Determination, Indigenous Peoples And Minorities*. Macquarie Law Journal, Vol 3, pg. 156. 2003

<sup>32</sup> The so called "authentic nationhood".

step of the process is, as can be imagined, the establishment of new forms of self-government from the once oppressed communities. The process here described is, to use Rigo Sureda' words<sup>33</sup>, “the vehicle of choice for achieving decolonisation. It was seen as the principle sentiment of subjugated peoples seeking emancipation from the colonial yoke”<sup>34</sup>. Several documents put these revolutionary dispositions on paper. One of the first and most important is the *Declaration on the Granting of Independence to Colonial Territories and Peoples*, ratified in 1960 and specifically concerning colonised peoples in relation with geopolitical conformations. The key concept in this was the notion of *dependence*, inherently linked with the conception of a territory -the colony- that was not contiguous with that of the Imperial state -the “mainland”. To counteract this disposition<sup>35</sup>, the 1960 Declaration issued several provisions explicitly on “colonialism and all its manifestations”<sup>36</sup>, effectively conveying what self-determination entails in international law. Some of the selected articles:

[...] [S]ubjugation, domination and exploitation of peoples constitutes a denial of human rights and is contrary to the United Nations Charter.

- That all people have the right to self-determination.
- That inadequacy of democratic institutions etc should not serve as a pretext for delaying independence.
- That armed action or repressive measures against a people struggling for independence should cease, and the integrity of their national territory be respected.
- That immediate steps should be taken in Non-Self Governing Territories to move them towards their independence.<sup>37</sup>

This declaration is of massive importance for the protection of colonised communities and their right to self-determination, since it places under the denial of human rights any

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<sup>33</sup> Sureda, Rigo. The Evolution of the Principle of Self-determination: A Study of UN Practice, 1973 in Castellino, Joshua. Gilbert, Jérémie. *Self-Determination, Indigenous Peoples And Minorities*. Macquarie Law Journal, Vol 3, pg. 156. 2003

<sup>34</sup> Pg. 158.

<sup>35</sup> See the case of Portugal and its enclaves in India, namely Daman and Diu in Castellino, Joshua. Gilbert, Jérémie. *Self-Determination, Indigenous Peoples And Minorities*. Macquarie Law Journal, Vol 3, pg. 159-160. 2003

<sup>36</sup> From the *Declaration on the Granting of Independence to Colonial Countries and Peoples*.

<sup>37</sup> From the *Declaration on the Granting of Independence to Colonial Countries and Peoples* in Castellino, Joshua. Gilbert, Jérémie. “Self-Determination, Indigenous Peoples And Minorities”. *Macquarie Law Journal*, Vol 3, pg. 159. 2003

“subjugation, domination or exploitation of people”. The authors also highlight that at point 3 the ceasing of armed action could be a green light for the communities who are pursuing self-determination. Finally, it should not be forgotten that not only geographical factors had been taken into account to compose the Declaration, but also political, administrative, economic, juridical and historical factors.

Corntassel and Hopkins Primeau raise another controversial point about both the applicability of the notion of self-determination and the line of action of governments towards the groups asking for it. As stated above for Castellino and Gilbert, in Corntassel and Hopkins Primeau’s work *Indigenous ‘Sovereignty’ and International Law: Revised Strategies For Pursuing ‘Self-Determination’*<sup>38</sup> issues of terminology for what self-determination truly entails in international law are also mentioned. From the indigenous peoples’ side, the general belief is not only that every indigenous community is entitled to the right of self-determination, but also that all the *peoples* have a right to do so; the reason would be that self-determination is an “inherent and inalienable right...which existed independently from recognition from [g]overnments and international organizations”<sup>39</sup>. This strong statement would then recall the secessionist model that was described above when analysing Koskeniemi’s standpoint<sup>40</sup> in Castellino and Gilbert, according to which indigenous groups would be entitled to plan and refer to their own forms of governments instead of depending on the central government’s channels for their socio-political needs. Taken to its logical conclusion, these domestic movements for independence would hold for all the indigenous groups<sup>41</sup> that see their political and cultural rights as an ethnic community jeopardized by the dominant government for the simplest of reasons: as of now, the international legal order still lacks of a proper throughout objective definition for the fundamental notion of self-determination. Finding themselves in this uncertain and sensitive condition of meeting or not the requirements for falling into said criteria, the demands for self-determination from many groups have recorded a notable increase

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<sup>38</sup> Corntassel, Hopkins Primeau. *Indigenous ‘Sovereignty’ and International Law: Revised Strategies For Pursuing ‘Self-Determination’*. *Human Rights Quarterly*. Vol 17. Pg. 348-349. 1995

<sup>39</sup> See footnote 20 in Corntassel, Hopkins Primeau. *Indigenous ‘Sovereignty’ and International Law: Revised Strategies For Pursuing ‘Self-Determination’*. *Human Rights Quarterly*. Vol 17. Pg. 348. 1995

<sup>40</sup> At pg. 10 of this dissertation.

<sup>41</sup> For some notable examples, see Corntassel, Hopkins Primeau above, pg. 349-350, cases of Turkey and Tasmania.

since the birth of the first movements for independence. However, even though the current situation may seem as entangled as a mangrove forest, the authors emphasize one of the criteria that is seemingly the most fundamental and that is able to meet an almost unanimous agreement: the factor regarding the pre-invasion and pre-colonisation presence of an ethnic settlement in their traditional territory -despite the lack of official and exhaustive historical records for it in most cases.

Another distinguished author who extensively faced the obstacles in the path to self-determination is Mauro Mazza<sup>42</sup>. In the third chapter, Mazza brings the attention to how the international legal order passed from considering the right to self-determination as a basic ideological and political principle, according to the League of Nations, to classifying it as a collective human right that all the peoples shall be entitled to, according to the United Nations. This last achievement also conquered great relevance on the global scene thanks to two ground-breaking documents, the International Covenant on Civil and Political Rights and the International Covenant on the Economic, Social and Cultural rights, both ratified in 1966. However, these documents did not specifically address the indigenous peoples, so that their power of application towards this social category could be put into doubt. The very core of the issue was, as can be supposed, the establishment of the indigenous peoples as peoples according to international agreements. The (positive) result after much debate was the 2007 United Nations Declaration on the Rights of Indigenous Peoples, a document that closely involves the collective rights of aboriginal peoples on two specific levels: first, the right to self-determination includes by definition not only the choice to freely define their own political status but also to freely pursue their economic, social and cultural development; second, indigenous peoples need the necessary funds to support the functions concerning their right to independence and autonomy.

Notably, the Nordic countries also ratified it and actively supported the Declaration; that is why, as Mazza remarks<sup>43</sup>, the governments of Finland, Sweden and Norway began to reflect on the possible juridical implications deriving from the association of the right to self-determination (according to the UN) and the right to self-government (according to

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<sup>42</sup> Mazza, Mauro. "Percorsi di ricerca sul diritto polare", *Quaderni*, pg. 115-116-117. Dipartimento di Scienze Politiche "Alberico da Rosciate", Jovene Editore, Napoli. 2011

<sup>43</sup> Pg. 116-117.

the *International Covenant on Civil and Political Rights* and the *International Covenant on the Economic, Social and Cultural rights*); the formal standpoint then expressed by the Saami Parliamentary Council states that, on the base of Art 1 from the two Covenants in question, indigenous communities must be entitled to the juridical status of “peoples”, thus receiving the right to self-determination as well. This political context will be of crucial relevance for our analysis, since the next paragraph will focus on Polar Law and the indigenous minorities living in northern Europe.

### *1.3 Polar Law and the right to self-determination for the indigenous communities of the Nordic countries*

As already introduced, Mauro Mazza based his work “Percorsi di ricerca sul diritto polare” on the situation of remarkable pluralism of the sources that involves the indigenous minorities of the north of Europe and their struggle towards the attainment of self-determination. According to the definition given by Mazza, polar law is a set of rules belonging both to international sources<sup>44</sup> and to domestic law<sup>45</sup> aiming to protect the extreme areas of Arctic and Antarctic territories. In particular, an interest in *folk law* (traditional common law) emerged as a new influential source, combined with *soft law*, to witness the raise of new political actors: the indigenous populations of the Arctic.

On a general level, *ius cogens* and *opinion iuris* related to human rights grant the same benefits to any bracket of the population. However, when working with local aboriginal people, human rights acquire a new powerful ally: human rights specifically committed to indigenous peoples (e.g. treaties between Arctic states and aboriginal communities).

Polar law shows some peculiar essential characteristics. First, it is a inevitably interdisciplinary subject, since the it includes both international and domestic law, but also secondary disciplines (some of them: environmental law, protection and promotion of the cultural heritage, etc.); second, the traditional ecological knowledge that indigenous people have protected and transmitted for centuries, whose approach based on the connection with Mother Earth may be a strikingly positive solution for the

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<sup>44</sup> General International law and international regulations exclusively devoted to polar areas.

<sup>45</sup> Arctic-related dispositions from the arctic states’ national legislators (Canada, USA, Russian Federation, Denmark, Norway, Sweden, Finland, and Iceland).



environment sustainability issues<sup>46</sup>. We will see the concrete results of these features in the following chapters. For the reason just mentioned above, the legal structure of indigenous peoples (labelled “multi-level arctic *governance*” by Mazza) involves sub-national organizations and authorities, among which are the tribal groups. Generally speaking, the subjects that can be identified in the following categories can be divided into subjects of international relevance (e.g. Regional and global safety, environmental protection) but also typically intergovernmental subjects (when the national/sub-national relationship takes place).

The author distinguishes between four types of institutional cooperation levels related to the North Pole:

1. Cooperation structures on a global scale. To this category, organizations such as the United Nations and the World Trade Organization are the most representative. A special recognition goes to the UN Permanent Forum on Indigenous Issues, UNPFII), since this dissertation is oriented to indigenous peoples' rights.
2. On the second level, a wide range of various associations work on a sub-global level to ensure efficient international relationships. As an example, the European Union is particularly active towards the arctic region through the arctic multilevel governance mentioned above. The matters which are under control and protection of this governance are mainly the safeguard of the environment, the bio sustainable use and preservation of the natural resources and the marine reserves. To keep a regional intergovernmental dialogue, the creation of the BEAC (*Barents*<sup>47</sup> *Euro-Arctic Council*) was also planned in 1993. It is very interesting to notice that representatives of indigenous communities such as the Sami also participate in the management and counselling procedures of BEAC in a special group, the *Working Group of Indigenous Peoples* (WGIP). On the contrary, to promote the dialogue and the efficient cooperation between the EU and Norway, Iceland and Russian Federation, the *Northern Dimension* was

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<sup>46</sup> See Part III, Chapter 6

<sup>47</sup> The Barents Sea belongs to the Arctic Sea and is located in the north between Norway and Russia. Its delimitation line has been officially defined with an agreement between the two countries in 2010.

established, whose wide commitments include the benefit and the economic collaboration of the region through the team work of such partnership.

3. An actual *arctic* cooperation joins the European regional cooperation on the institutional level thanks to the *Arctic Council*, established in 1996 with the Ottawa Declaration; it is a permanent intergovernmental council whose goal is not only promoting the cooperation and the coordination among the arctic countries involving the indigenous communities of the arctic territory, but also supporting the sustainable development and the environmental protection of the polar area.<sup>48</sup>
4. The Nord-Atlantic cooperation and the cross-border between regions of the arctic pole. To the first category, a relevant example is the North Atlantic Cooperation, while for the second category the cross-territorial cooperation between Nunavut (Canadian Federation) and Greenland (belonging to Denmark) should be mentioned.

Generally speaking, the overall institutional framework is still, to a certain extent, lacking structural organisation. However, the effort devoted into the coordination of such a wide range of associations and institutional bodies working on different levels - governmental and intergovernmental- is praiseworthy and need to be supported and implemented.

Certainly, one of the central issues regarding the political status of minorities and indigenous peoples is, needless to say, the attainment of self-determination and autonomy. The notion of this right is included in Art 4 of the 2007 *United Nations Declaration on the Rights of Indigenous Peoples*, where it is explicitly stated that the indigenous peoples, through their right to self-determination that they are entitled to, can exercise their right to autonomy or self-determination for what the internal local matters of their tribes are concerned, and also in relation to the ways of funding their own autonomous functions. As we examined in the previous chapter when reflecting on the political struggles of indigenous communities in general, the issues surrounding

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<sup>48</sup> It must be noticed that the arctic cooperation differs from the Nordic cooperation. The latter's most important institutional instruments are the *Nordic Council* and the *Nordic Council of Ministers*.

these two types of rights- to autonomy and self-determination- are peculiarly related to the definition of “indigenous peoples” itself. Also, in this case, the notion of autonomy need to compare itself with the collective right to autonomy<sup>49</sup>. However, in this regard, Mazza<sup>50</sup> points out two conditions that should be kept into consideration: first, the concepts of autonomy, self-government and internal self-determination are seen as equivalent; second, the inclination towards the marginalisation of ethnic groups and minorities (which represent indeed the social categories that are the most entitled to attain autonomy and self-determination) by the international community has been historically rooted into society to the extent that a sudden change of view would be hardly attainable.

Before proceeding to further analysis, some new clarification on the terminology used should be suggested. First, the *summa divisio* between right to internal self-determination and right to external determination: the first equals secession<sup>51</sup> or independence and is observed through the recognition of the right to autonomy and self-government, while the second is based on the internal structures of self-government. Second, the concept of right to autonomy is part of the right to self-determination, whose extent can also include the right to external self-determination and to self-government.

Given the distinction between internal and external right to self-determination, Mazza also enriches his reflection on the indigenous peoples’ autonomy with its fundamental and constant characteristics, which will be listed below:

- As already said, indigenous peoples’ autonomy (their self-government) is a inherent and essential part of their right to self-determination;

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<sup>49</sup> As Erica-Irene Daes stresses, indigenous peoples had every right to insist on claiming their right to self-determination. The reasons are included in her historical considerations on the topic: “Indigenous peoples were never a part of State-building. They did not have an opportunity to participate in designing modern constitutions of the States in which they live, or to share, in any meaningful way, in national decision-making. In some countries they have been excluded by law or force, but in many countries they have been separated by language, poverty, misery, and the prejudices of their non-indigenous neighbours”. From Daes, Irene-Erica. “Some Considerations on the Rights of Indigenous Peoples to Self-Determination” in *Transnat’l L & Contemp Probs*, 8 and 9, 1993 in Lenzerini, F. *Reparations for Indigenous People. International and Comparative Perspectives*. Pg. 374. Oxford University Press Inc, New York. 2008

<sup>50</sup> Pg. 40-41.

<sup>51</sup> the so called “right to secession”.

- Connected to Point 1, the official national borders of the sovereign state are not susceptible to modifications in any case after the attainment of autonomy, self-government or self-determination by the indigenous communities;
- The political autonomy of indigenous peoples requires the recognition of the right to self-government -including self-management;
- As a consequences of the first 3 points described above, the indigenous autonomy allows, within the national jurisdictional borders, not only the promotion not only of human rights and their protection but also of environmental sustainability and the participation of representatives from the ethnic groups in the decisional process of public interest.
- Lastly, indigenous political autonomy enhances the cooperation development between the sovereign states' political spheres and the tribal communities, the new protagonists of the international scene thanks to their new ability to ratify state-level legally-binding agreements.

Two essentials elements must be considered when dealing with indigenous autonomy claims, respectively an inherent and an external right. The internal factor is related to the notion of the indigenous peoples' right to autonomy and self-determination as an inherent right, which means a fundamental pre-existing human right in force before the arrival of the colonisers; for its feature of being "pre-existing", the inherent right to the aboriginal self-government "[...] cannot in any case be considered as extinct"<sup>52</sup>. Following the logic of this statement, this right exists in presence, *but also absence*, of agreements with the federal/national authorities, and it also belongs to the domestic constitutional law along with the State's government level -national, federal, regional, provincial. As far as the external element is concerned, we should examine the very close unilateral relation between the indigenous community and the sovereign state's public and constitutional legal orders. Based on the form of government of the state in whose territory indigenous communities live in, the tribal communities may find limitations to their right to self-determination if not enough comprehensive land claims agreements are ratified. This is not the case of Canada's government, where indigenous groups located in Yukon and Nunavut<sup>53</sup>, Quebec, Labrador and Newfoundland

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<sup>52</sup> My translation from Mazza, pag. 56.

<sup>53</sup> State in which the indigenous population records the 85% of the total population.

established relations at the federal, national and provincial level with a variety of indigenous representatives for each level. The arctic countries offer a great variety of forms of government, among which *common law*, *civil law* and post-socialist; thus, the institutional solutions for the government of the arctic areas are various. Mazza suggests an overview on some guidelines to implement:

1. On the political and institutional level, the general goals of such partnership are efficacy and efficiency, legal pertinence, innovation and quality of the institutions, both in general public law and specialised indigenous law.
2. According to the current regulatory framework, planning efficient economic policies for the government of the Arctic (e.g. financial autonomy guarantee)
3. Educational policies and adequate treatment to social diseases related to drug and alcohol abuse, unemployment, precarious health conditions, high suicide rate.
4. Last but not least, the political instruments for a correct and efficient connection between the federal/national/regional/provincial level and the representatives of the indigenous parties.

As seen in these points, several among the most prevalent problems are of financial and fiscal origin. The social and economic structure and the high costs necessary to launch activities and services in the arctic areas are considerable obstacles to the financial autonomy of the aboriginal groups, resulting in the State itself becoming the first provider of goods and services to the indigenous counterpart and the latter witnessing the gradual reduction of their freedom. Mazza closes the chapter suggesting a possible solution: granting part of the revenue from the exploitation of the surrounding area's natural resources to the indigenous community. However, this solution is not very successful and received much criticism in consideration of its medium-long term period consequences, since it may lead such indigenous communities to see a decrease in their financial autonomy, as already mentioned. The only possible goal to target in order to break this loop may therefore be the simple improvement of the general life conditions of the indigenous groups of the arctic area.

#### *1.4 Institutions and agreements concerning the indigenous matters*

In this subparagraph, we are going to examine some of the most relevant institutions taking care of the indigenous matters on an international scale. The safeguard of the indigenous populations' individual and collective rights depends on the protective instruments granted by the international legal order. These instruments are represented by formal agreements signed by international associations and the indigenous communities. Some of the most fundamental and influential international institutions in the field of the indigenous rights and their protection are the United Nations (UN), the Council of Europe, the Organisation for Security and Co-operation in Europe (OSCE), the Organization of American States (OAS) and the International Labour Organisation (ILO). Among these, the organisations that are involved the most in the matters above mentioned are the United Nations and the International Labour Organisation, whose special *ad hoc* commissions' goal is monitoring the implementation of said rights; a special mention goes to the UN Human Rights Council, established by the UN General Assembly in 2006. This authority substituted the pre-existing UN Commission on Human Rights and is "an inter-governmental body within the United Nations system made up of 47 States responsible for the promotion and protection of all human rights around the globe"<sup>54</sup> and for contrasting discrimination worldwide while granting equality to indigenous and non-indigenous people. To reach these goals, the HRC can verify cases of violations of human rights and provide suitable recommendations<sup>55</sup>. Along with the representatives from the 47 States that are part of the HRC, non-governmental organizations and other agencies specialised in human rights protection can take part in the reunions of such association as observers. The Human Rights Council also presents some special features (related to the prevention of discrimination not only of indigenous peoples, but also of minorities in general), that we are going to list according to Mazza's classification. First, a specially designed advisory authority is the *Human Rights Council Advisory Committee*, composed of 18 experts. Among the

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<sup>54</sup> From the OHCHR website, available at <http://www.ohchr.org/en/hrbodies/hrc/pages/hrcindex.aspx>.

<sup>55</sup> With no binding power.

other special *rapporteurs* and subsidiary bodies are the *United Nations Special Rapporteur on the Rights of Indigenous Peoples* (UNSR)<sup>56</sup> and the *Expert Mechanism on the Rights of Indigenous Peoples* (EMRIP), in substitution of the former *Working Group on Indigenous Populations* (WGIP)<sup>57</sup>. Second, the fundamental document for the HRC is the *Universal Declaration of Human Rights* of 1948. Third, another relevant working commission is the *Economic and Social Council* (ECOSOC), whose mission is described in Art 61-72 of the United Nations Charter and whose subsidiary authorities are specifically devoted to the indigenous issues; they are the *Commission on Population and Development*; the *Commission for Social Development*; the *Commission on the Status of Women*, the *Commission on Sustainable Development* and the *Commission on Crime Prevention and Criminal Justice*. Fourth, three other fundamental authorities that effectively cooperate to the safeguard of the human rights are the *United Nation High Commissioner for Human Rights* of Geneva; UNESCO (*United Nations Educational, Scientific and Cultural Organization*), devoted to the discrimination in the field of education; and the *World Bank*, promoting several initiatives benefitting women, children, and aboriginal and tribal communities.

To conclude our overview on Polar Law and have a complete framework of the instruments apt to the protection not only of human rights in general but also of this endangered population group of the Arctic, we are also going to mention below some of the most relevant and empowering international treaties and the authorities in charge of the agreement's efficacy constant monitoring.

#### *Agreements concerning communal rights*

- The International Covenant on Civil and Political Rights (ICCPR), supervised by the Human Rights Committee;
- The International Covenant on Economic, Social and Cultural Rights (ICESCR), supervised by the Committee on Economic, Social and Cultural Rights;

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<sup>56</sup> A role now occupied by Ms. Victoria Tauli Corpuz (Philippines), who took up professor James Anaya's previous mandate in 2014.

<sup>57</sup> See Mazza above, pg. 73.

*Agreements concerning severe violations of human rights*

- The International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD), supervised by the Committee on the Elimination of Racial Discrimination;
- The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supervised by the Committee Against Torture (CAT);

*Agreements concerning severe violations of human rights*

- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), supervised by the Committee on the Elimination of Discrimination against Women;
- The United Nations Convention of the Rights of the Child (UNCRC), supervised by the Committee on the Rights of the Children (CRC);
- The United Nations Convention on the Rights of Persons with Disabilities, supervised by the Committee on the Rights of Persons with Disabilities (CRPD);
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, supervised by the Committee on the Protection of the Rights of All Migrants Workers and Members of Their Families (CMW).

*1.5 Focus on Linguistic Rights*



Linguistic rights (LHRs) are analysed as one type of human right, reflecting an inalienable norm. Rights are needed for speakers of dominated languages, who individually and collectively experience linguistic ‘wrongs’, marginalization, and ultimately the extinction of languages<sup>58</sup>. (Phillipson & Tove)<sup>59</sup>

We introduced this short subparagraph<sup>60</sup> focusing on linguistic rights with Phillipson and Tove’s quotation, which encloses several of the fundamental features of linguistic rights. First of all, linguistic rights belong to the inalienable and universally recognised types of rights, thus their lack due to conscious deprivation is against a fair and human treatment -which is likely to result in social conflicts. Language represents indeed one of the factors that contribute to ethnic identification, thus it is an inherent and “culturally” personal element. Second, for the reason just mentioned, the most affected part of the population because of said deprivation is the minority fringe, both on an individual and a collective<sup>61</sup> scale.

When exploring the dimension of language protection in particular, it is inevitable to mention an expert in this field, professor and researcher Giovanni Poggeschi, who put his considerations on language rights protection in many publications. A complete and fundamental work is “I diritti linguistici. Un’analisi comparata”<sup>62</sup>, where the author provides an exhaustive overview on the minorities and their rights protection’s struggles for claims, supporting his thesis by providing some relevant examples of legal systems in all the five continents. Regardless of the ethnic group involved, language always represents a distinctive sign of identity, thus it is often the centre of discriminative behaviours and prejudices. Due to its important role in society, it shall not surprise that a mutual influence exists between the form of government and the language rights

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<sup>58</sup> Also called “linguicide”, “glottophagie”, or “linguistic cannibalism”. Often a conscious attempt of dominant fringes of society to eliminate the minorities’ features (p. 484); an example of it is Turkey’s policy towards Kurdish. (p. 486)

<sup>59</sup> Phillipson, Robert. Tove, Skutnabb-Kangas. *Linguistic Rights and Wrongs*. Pg. 483. Roskilde University.

<sup>60</sup> In this dissertation, no priority is intentionally given to any kind of rights. Despite this, language rights needed a special mention due to their relevant role in ethnic conflicts analysis, in the variety of population categories they affect and in the development of society itself. Also (last but not least), languages are my major, hence my will to give language rights a special yet brief overview in the most general section of this dissertation.

<sup>61</sup> Entitling such group to exist and to be “different “.

<sup>62</sup> Poggeschi, Giovanni. *I diritti linguistici. Un’analisi comparata*. Diritto e Politica/5. Carocci editore, April 2010. I take this opportunity to thank prof. Poggeschi once again, for accepting to be my supervisor for this thesis, for his precious help during the research phase and, last but not least, for his undeniable love for languages and minorities’ issues.

discipline: language and law are related through the law's need of linguistic instruments, as any other form of communication.

Languages and the linguistic factor penetrate many fields in society, among the others, education, public administration (justice included), toponymy, mass media, etc. Nevertheless, the jurisdictional regulation of languages is a rather recent phenomenon, as Poggeschi underlines. Its roots are to be found in the process towards democratisation of contemporary States, and involves both the *internal/intrinsic* and the *external/extrinsic* aspects. The *internal* or *intrinsic* aspect deals with the clarity of the language itself and its coherence in the regulations' content; legal language must be clear and able to convey the message as precisely as possible, in order not to leave room to ambiguity and misinterpretations. For what the *external* or *extrinsic* aspect is concerned, it refers to the regulation of languages as a legal value connected to its own culture<sup>63</sup>; from mere means of communication, language becomes the subject and the defining element of the *Volksgeist*<sup>64</sup> of each group, emphasizing the different relation with the other national groups in contrast with the belonging to a specific community<sup>65</sup>. The conflicts that often arouse because of this contrast show how a substantial component of the heated political confrontations whose protagonists were the ethnic communities of a state was based on the language claims of such communities. Analysing these occurrences, we cannot but acknowledge that the external or extrinsic aspect of linguistic rights implies a potentially (often) hostile relation between the languages of a country. (Poggeschi also underlines that such friction among supporters/speakers of a language rather than another one is not produced in the internal or intrinsic aspect, since in this aspect the protagonists all speak the same language). Despite the description of the two aspects made above, the intrinsic and the extrinsic factors are not independent: both of them need to be implemented by appropriate language policies on all the territorial levels' governance in order to boost the use of a language through efficient efforts (i.e. changing the alphabet, as for Turkish, or updating

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<sup>63</sup> Hence its unavoidable link to the nation-state.

<sup>64</sup> A term introduced by philosopher, theologian and Romantic writer Johann Gottfried Herder, meaning "spirit of the people/nation" (from *Volk* = people and *Geist* = spirit).

<sup>65</sup> This feature, typical of language rights, is marked by the conflicts and the confrontational load that it often brings.

its vocabulary to include modern suitable political and jurisdictional terms, as for Arabic).

The core of Poggeschi's introduction is the distinction he suggests on the types of language rights. These modern<sup>66</sup> rights are divided into three categories, *prima specie*, *seconda specie* and *terza specie*, (first, second, and third type). Below a description for each group is given according to Poggeschi's classification:

1. *Diritti di prima specie (rights of the 1<sup>st</sup> type)*. The rights of the 1<sup>st</sup> type descend from the application of the fundamental rights of the individual and mostly address the right to non-discrimination based on the mother tongue or the dominant language of an individual. Another fundamental criterion set by Poggeschi in order to pinpoint the rights of the 1<sup>st</sup> type is when their application only affects the citizens of a state. Among these fundamental rights, language plays a "transversal" role<sup>67</sup> with a strong impact on those fields in which fundamental rights are applied. However, ensuring rights of the 1<sup>st</sup> type *tout court* does not necessarily mean that language rights of the 1<sup>st</sup> type are automatically granted; this was indeed the case of France's legal order, but this conception has been gradually abandoned in the last years.

A particular feature of the rights of the 1<sup>st</sup> type is that, when they are well developed and protected in a state's regulation, they easily evolve into rights of the 2<sup>nd</sup> type. As Poggeschi underlines, it is certain to presume that minority rights have a relevant status in those countries where rights of the 1<sup>st</sup> type are strongly valued in the first place. However, a balance between the protection of the status of a language and the principle of equality must be reached, or violations of the latter may occur in the case the members of the dominant language's group are entitled special linguistic privileges. For what the dominant language is concerned, its knowledge is the first essential prerequisite for the full enjoyment of the fundamental rights<sup>68</sup> and for the opportunity of social and

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<sup>66</sup> Since they imply the State's intervention to receive their implementation (especially in the case of rights of the 2<sup>nd</sup> and 3<sup>rd</sup> types).

<sup>67</sup> Poggeschi, Giovanni. *I diritti linguistici. Un'analisi comparata*. Pg. 32. Diritto e Politica/5. Carocci editore, April 2010.

<sup>68</sup> Thus, it represents one of the clearest linguistic duties of the first type. Obviously, the majority members of the population also have to conform to and observe this duty.

economic growth for the strangers and their descendants. For these reasons, the State has among its modern aims the integration into society through the linguistic integration, which not only reflects individual but also collective rights.

2. *Diritti di seconda specie (rights of the 2<sup>nd</sup> type)*. The rights of the 2<sup>nd</sup> type are the special rights attributed to the national or historical minorities, which are based on the concept of substantial equality. As for the rights of the 1<sup>st</sup> type, these rights are connected to the right to non-discrimination. A case in point of this kind of rights is the creation of a (not only) territorial autonomy in which the language protection is particularly effective; most cases would also see the official status of the minority language on a national level. Cases of rights of the 2<sup>nd</sup> type are Cataloña and Südtirol. However, more than one sub-state authority pursue *English only* policies (e.g. The United States), leaving the implementation and the protection of the rights of the 2<sup>nd</sup> type and their linguistic difference to the *super partes* Federation, which is supposed to make concrete efforts towards the integration (rights of the 1<sup>st</sup> type) of the minority fringe. On a final note, if the rights of the 2<sup>nd</sup> type prevail on the rights of the 1<sup>st</sup> type, a case of secession will occur.
3. *Diritti di terza specie (rights of the 3<sup>rd</sup> type)*. The rights of the 3<sup>rd</sup> type are designed for the foreigners and their descendants and they respect the rights of the 1<sup>st</sup> type, which continue to be the fundamental basis. This kind of rights finds a fertile ground for growing and evolving in those countries that value multiculturalism and multilingualism “emphasizing the constitutional values”<sup>69</sup>. In democratic societies, the rights of the 3<sup>rd</sup> type represent a substantial extension of the rights of the 1<sup>st</sup> type and they focus on the social integration of the historical, cultural, and social variety of the foreigners and the second generations. In other words, they consist, according to Poggeschi, of some sort of semi-official recognition of the languages of the immigrants and of the second generations. Unfortunately, these rights are still not widespread in most of the national legal systems –they should, on the contrary, be enhanced and

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<sup>69</sup> My translation of Poggeschi (*ibidem*), pg. 38.

promoted, especially in those countries where a notable number of foreigners resides<sup>70</sup>.

On a final note, in his continuous research activity, Poggeschi stresses the fundamental role that comparative law plays in the development and growth of minority language rights. In particular, the author suggests a comparison on a micro-level, i.g. the European court decisions on language rights controversies. Its efficacy and uniqueness lie in its offering solutions through terms of comparison that are external to the states' legal systems.

Although language bears such a great importance for an ethnic community and is considered as one of the most important cultural core values and identifying elements, throughout the centuries the languages of minority groups have been, in the most cases, despised and ostracized, to the extent of being formally abolished in some countries. The reason why such a language policy has been adopted by more than a government is based on two myths<sup>71</sup>. First, it is believed that monolingualism is to be preferred to multilingualism, for a simple economic reason. To prove it, in a study of around 120 countries, Fishman (1989)<sup>72</sup> investigated the relationship between the presence of multilingual communities in a country and its level of national wealth, finding no relevant evidence for the potential existence of such causal link. The second myth is related to the fact that minority rights would supposedly "jeopardize" the concept of Nation-state, since "[...] Minorities do not simply disappear; they may appear dormant for a while, but history tells us that they stay on the map", according to Alfredsson, of the UN Center for Human Rights in Geneva (1991:39)<sup>73</sup>. A possible solution, suggested

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<sup>70</sup> See, for example, the difference between the countries of "old" immigration and "recent" immigration flow in Poggeschi (*ibidem*), pg. 39.

<sup>71</sup> Phillipson, Robert. Tove, Skutnabb-Kangas. *Linguistic Rights and Wrongs*. Pg. 495. Roskilde University.

<sup>72</sup> Fishman, J. A. *Language and Ethnicity in Minority Sociolinguistic Perspective*. Clevedon and Philadelphia: Multilingual Matters. 1989 in Phillipson, Robert. Tove, Skutnabb-Kangas. *Linguistic Rights and Wrongs*. Pg. 495. Roskilde University.

<sup>73</sup> Alfredsson, G. "Minority Rights: Equality and Non-Discrimination" in Krag and Yukhneva (eds.), 1991 in Fishman, J. A. *Language and Ethnicity in Minority Sociolinguistic Perspective*. Clevedon and

by Alfreddson himself, would then be “the recognition of and respect for special minority rights”, since they “[...] are viable alternatives to oppression and neglect”<sup>74</sup>. Despite this, a peaceful dialogue between the dominant fringe of society and the minority is not granted even though they share the same language<sup>75</sup>, thus leading to the conclusive reflection that there is no solid evidence of a correlation conflict/difference of language and ethnicity. (The same logic can apply for economic reasons, which are quite often present in conflicts but rarely are their cause).

Language discrimination is, as can be easily imagined, linked to racism. Racism, which is nowadays considered abolished *on paper*, has seemingly been “replaced by more sophisticated forms of racism, *ethnicism*<sup>76</sup> and *linguicism*<sup>77</sup>”. These new forms of discrimination’s main use is to provide a new legitimate -yet unfounded- reason for social “hierarchization” and to demonstrate, once again, the supposed existence of languages fitter to rule than others. Also, these three concepts, born from the hegemonic will of the dominant group, ensure that the other minority members do not have access to “resources and a fair chance to survive”.

Another deprivation that minorities have to endure is the exclusion of their language in school timetables and teacher-training courses, resulting in concealing the language and preventing its diffusion in society to an even greater extent. Phillipson and Skutnabb-Kangas state that, since minority languages are seen as handicaps that prevent minority children from focusing on the dominant resource, said minority children should drop the acquisition of their traditional language for their own interest. On the contrary, many other minority children are first prevented from acquiring such dominant resource due

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Philadelphia: Multilingual Matters. 1989 in Phillipson, Robert. Tove, Skutnabb-Kangas. *Linguistic Rights and Wrongs*. Pg. 495. Roskilde University.

<sup>74</sup> *Ibidem*.

<sup>75</sup> See the case of Serbs and Croats in Fishman, J. A. *Language and Ethnicity in Minority Sociolinguistic Perspective*. Clevedon and Philadelphia: Multilingual Matters. 1989 in Phillipson, Robert. Tove, Skutnabb-Kangas. *Linguistic Rights and Wrongs*. Pg. 496. Roskilde University.

<sup>76</sup> Mullard, C. “Racism, ethnicity, and etharchy or not? The principles of progressive control and transformative change” in Skutnabb-Kangas, T. Cummins, J. (eds.) *Minority Education: From Shame to Struggle*. Clevedon: Multilingual Matters, ppg. 357-78, 1988 in Phillipson, Robert. Tove, Skutnabb-Kangas. *Linguistic Rights and Wrongs*. Pg. 497. Roskilde University.

<sup>77</sup> Skutnabb-Kangas, T. Cummins, J. (eds.) *Minority Education: From Shame to Struggle*. Clevedon: Multilingual Matters, 1988 in Phillipson, Robert. Tove, Skutnabb-Kangas. *Linguistic Rights and Wrongs*. Pg. 497. Roskilde University.

to a lack of sufficient and suitable educational structures and seeing their language rights “murdered”.

In order to safeguard language rights in all their applications, a ground-breaking achievement has been reached on the European level: a *European Charter for Regional or Minority Rights*, adopted by the members belonging to the Council of Europe in 1992. In this document, the right to speak and cultivate a regional or minority right in the private or public sphere is considered as an alienable right, and the values of multilingualism and multiculturalism are promoted and enhanced. Although it must be admitted that the Charter presents many limitations and minimalistically fulfils only the most basic political requirements related to the rights that it is supposed to protect, it is also fair to show the other side of the coin, and highlight the impact that this document has had on the minorities located in Europe and the future of their linguistic (and not only) heritage -in particular, the rise of awareness on the condition of these fringes of the population from a political point of view.

## Chapter 2

Indigenous peoples emphasize a holistic conceptualization of culture which covers land, immovable and movable heritage, tangible and intangible elements. (Lenzerini, p.200)<sup>78</sup>

The quotation that was chosen to open this chapter encloses what I personally consider as the most precious and unique characteristic that indigenous peoples, regardless of their geographical location and their cultural origin, share and transmit: the fact that, from time immemorial, these populations have been nurturing a peculiar and extraordinary relation with nature, becoming the guardians of its secrets and rules. This represents the key point that designates indigenous peoples among minorities, as described in Chapter 1. However, later in this section several other features will be examined in depth, taking as an example the only translational indigenous community officially recognised in Europe: the Sami people. In particular, Chapter 2 will be divided into three subsections: the first one regards the cultural dimension concerning the Sami people, where descriptions of their traditional livelihoods, consideration of the environment from a spiritual standpoint, and health history are provided; the second part will then draw the attention on the political order of the Sami people, with the structure and the functions of the Sami Parliaments; finally, the third part will display several historically and socially interesting facts related to the Sami communities of Finland, Sweden, Norway and the Kola Peninsula, Russia, respectively.

### *2.1 The sociocultural dimension of Sami people*

As outlined above, the issues of this section are not configured to provide general knowledge on the Sami people, which can be easily found in the abundant research on the topic. On the contrary, after some brief annotations on the estimates of the total population and some relevant historical notes, the chapter will produce some reflections

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<sup>78</sup>Essay by Vrdoljak Ana F. in Lenzerini, F. *Reparations for Indigenous People. International and Comparative Perspectives*. Oxford University Press Inc, New York. 2008.



on socially remarkable processes and considerations that have been developing in the past decades and show important -and sometimes severe- consequences in the present times. The purpose of this choice is to introduce the reader to the socially, historically and politically-oriented content of Part II, rather than giving purely culturally notions.

### *Denominations*

The Sami people's roots trace back to such ancient times that this population has been known in history with several names. In the autochthonous language, they call



**Figura 1. map of the *Sápmi* region. (Google Images)**

themselves *sámit* o *sápmelaš*; from these names is likely to come the etymology of the official denominations used inside and outside Europe, which are *Sami*, *Saami* or *Sámi*. In English, they are also known under the names *Lapps* and *Laplanders*, because of the official denomination of their territory, Lapland, the northernmost part of Europe. Their

territory -which, as it will be described in this chapter, extends along four countries- is called, in their autochthonous language, *Sápmi* (*Sámiland*).

As can be imagined for other indigenous communities, the number of members belonging to the Sami population is not easy to calculate due to a lack of official census among them. Also, another fundamental factor must be necessarily remembered: as we analysed in depth in Chapter 1, the very blurred definition of *indigenous people* causes a great obstacle in calculating a precise and actual number. However, estimates have been made by the Arctic Centre of the University of Rovaniemi (Lapland) on the Sami people (here in crescent order)<sup>79</sup>:

- The total amount of the population: 90.000 - 100.000
- Sami people in Norway: 60.000 - 65.000
- Sami people in Sweden: 20.000
- Sami people in Finland: 8000 - 10.000
- Sami people in Russia [Kola Peninsula]: 2000?<sup>80</sup>

### *Historical overview*

The history of Sami people<sup>81</sup>, just like many other indigenous groups, shows a rather similar (full of obstacles) path. Stefania Errico and Barbara Ann Hocking<sup>82</sup> trace quite a brief yet exhaustive framework of the historical events that affected this people since the earliest records available.

The Sami people are typically a nomadic people that inhabited the northern lands of Europe and the current countries of Finland, Sweden, Norway and Northern Russia. It is believed that the Sami people arrived on the Fenno-Scandinavian peninsula over 10,000 bpe (*before present era*)<sup>83</sup>, so they are commonly considered as the first inhabitants of

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<sup>79</sup> Mazza, Mauro. "Percorsi di ricerca sul diritto polare", *Quaderni*, pg. 84, footnote 34. Dipartimento di Scienze Politiche "Alberico da Rosciate", Jovene Editore, Napoli. 2011

<sup>80</sup> Due to the policies of Russia in internal affairs, the total number of the Sami people in the Kola Peninsula is the most uncertain estimate.

<sup>81</sup> In this chapter, in a really brief version. A more in-depth historical analysis of indigenous communities (and consequently Sami people) will be offered in Part II Chapter 1.

<sup>82</sup> Errico, Stefania. Ann Hocking, Barbara. *Reparations for Indigenous Peoples in Europe: The Case of the Sámi People*. Pg. 371-373. in Lenzerini, F. *Reparations for Indigenous People. International and Comparative Perspectives*. Oxford University Press Inc, New York. 2008

<sup>83</sup> Burmeister Hicks, Christian Jakob. Historical Synopsis of the Sami/United Nations Relationship. *The Arctic* website, 2000. Available at <http://www.thearctic.is/articles/topics/samisynopsis/references.htm> .

the area. Their traditional activities, related to environmental factors, were mainly reindeer grazing, hunting, gathering in the forests and fishing in the abundant bodies of water offered by the area. From a relative point of view, it was quite fortunate that the Sami people's nomadic nature and adaptive skills<sup>84</sup> revealed themselves more than necessary when other foreign dominant peoples came to threaten their land possession.

It was in that period, centuries ago, that the first contact between Sami people and non-Sami peoples took place, and precisely for economic reasons: the barter was the only method of payment at the time, and the Sami learnt how to trade their abundant provisions of furs with salt (ideal for storing food) and iron tools (for hunting of cooking purposes). However, with the coming of trade and modern progress, taxes started to be voluntarily applied -imposed from the outside- on those Sami tribes living in the trading area. Later on, taxation too became a good to trade, since Sami received back protection against "thieves, outlaws and dishonest tradesmen". When the taxation mechanism started to give good results in financial terms, the Kings of the nearby areas began showing increasing interest in the Sami population, now seen as a profitable -if not essential- source of income. However, this importance given -or received?- to this indigenous people revealed itself as a negative involvement in the 16<sup>th</sup> century, when wars along the borders started to break up, especially between Norway and Sweden.

The geopolitical scenery of the time drastically changed in 1751, when a treaty containing the exact delimitations of the Kingdoms of Sweden and Norway was signed, consequently resulting in a new legal conformation of the Sami territory. Despite this radical change, an annex of the treaty was also released to benefit the indigenous population, the *Lapp Kodicill*<sup>85</sup>, which was meant to regulate the right of moving across borders in connection with reindeer herding. This document is also fundamental for its explicit will to maintain "the Sami nation's continued existence" and also their right to benefit from the natural resources of the area<sup>86</sup>. The issue of land rights connected to

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<sup>84</sup> In order to follow their food sources moving northward and to adapt to the different harsh ecosystems.

<sup>85</sup> Often seen as the "Magna Carta" of the Sami people, since it recognised their pre-existing rights on the land, while it actually does not strip them of the pre-existing land rights they had but neither it confers said rights to the Sami people.

<sup>86</sup> Ahren, M. "Indigenous Peoples' Culture, Customs, and Traditions and Customary Law - The Saami People's Perspective", *Arizona Journal of International and Comparative Law*, 63 at 73, pg. 78, 2004. In Lenzerini, F. *Reparations for Indigenous People. International and Comparative Perspectives*. Oxford University Press Inc, New York. 2008.

properties reached its peak in the middle of 19<sup>th</sup> century, when *customary law* approved by Sami courts, which had always been respected by the non-Sami governmental authorities, ceased to be respected. Due to the increased interest of Scandinavian countries in the Sami land's resources, these states began to claim ownership of such territory, providing a surprising reason: the Sami people was a nomadic community and not "settled, individual owners". And, as Errico and Hocking conclude, "as a result, in the nineteenth century Nordic Countries could take control over the Sámi people's traditional lands".

### *Reindeer herding*

Undoubtedly, the most traditional and characteristic livelihood practised by Sami people is reindeer herding. Despite their nomadic origins, Sami people have been taming and breeding these animals, which are very abundant living freely in the Nordic regions' forests. Nowadays, this activity is of completely Sami exclusive competence in most of the states where Sami communities dwell, and it is conducted on a modern, semi-nomadic base: the farmers move their semi-domesticated herds between coast and inland, and also across national borders (as happens between Norway and Sweden). Presently, this activity has greatly improved through the adoption of mechanical processes and cutting-edge technologies, without forgetting, in any case, the traditional knowledge on the relation with Mother Earth transmitted by the ancestors. (Reindeer meat production is also an active business for the Sami people. Despite its family-based consumption and the profit from the sales, meat production is still proudly considered as a traditional activity and a very important part of the Sami identity)<sup>87</sup>.

Despite being an established practice in Sami's daily life during the centuries, the reindeer herding's controversy is growing exponentially; the reason is the establishment of the criteria for the membership in the Sami community. I would like to draw the attention on this controversy by examining a sentence<sup>88</sup> pronounced in 2011 by the

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<sup>87</sup>Information available at <https://www.landbruksdirektoratet.no/en/> and <http://galdu.custompublish.com/home.347689.en.html>.

<sup>88</sup> Another ground-breaking sentence, followed by a governmental Act, was pronounced in Sweden in 1971 and will be analysed in detail in the section *The Reindeer Husbandry Act and the Kitok case* of this chapter.

*Högsta Domstolen*<sup>89</sup>: the Swedish Supreme Court recognised the traditional right of the Swedish indigenous community on reindeer herding. A total of 104 landowners of Västerbotten county presented a case in court against three local villages (the *siida* of Ran, Umbyn and Vapsten) of Sami farmers. The landowners stated that reindeer herding was a dangerous and harmful activity for the woodland present in their territory, and that for such reason the claims of indigenous peoples were to be considered illegal. Sami people's defence was on the contrary based on the traditional feature of their livelihood, which had been practised *since time immemorial* and, in particular, before the arrival of the Swedish people in Northern Scandinavia. The Sami people's statement were accepted by the Swedish supreme magistrates, who also established a refund for their legal expenses.

As of today, since the closing of the borders and the exacerbation of the political relations between Norway and Sweden on the topic, no reindeer-herding activities are practised across the Swedish-Finnish borders and physical measures, such as fences, were erected to contrast the free passage of the animals<sup>90</sup>.

Unfortunately, territoriality and borders are issues that should not be defined by law on paper. The current unsatisfactory situation shows irregular and conflicting borders that prevent the regular and undisturbed passage of the reindeers across the boundaries, creating imbalanced positions; the Norwegian side of *Sápmi* presents a richer summer grazing area than Sweden, which on the contrary has more forests and is thus more suitable during the winter period<sup>91</sup>. Moreover, the consequences are not only of economic nature (harms to the *siida*<sup>92</sup> system and loss of the industry's assets due to the

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<sup>89</sup> Mazza, Mauro. "Percorsi di ricerca sul diritto polare", *Quaderni*, pg. 123, footnote 18. Dipartimento di Scienze Politiche "Alberico da Rosciate", Jovene Editore, Napoli. 2011

<sup>90</sup> Such measures were regulated through a treaty signed in 1925.

<sup>91</sup> In order to guarantee the reindeer herding cycle's effectiveness, both types of environment are obviously necessary.

<sup>92</sup> Poggeschi furnishes some interesting points on the Sami *siida* and its importance for the natives: it represents the first and the most important political organisational structure with decisional power on the distribution of the land, the water, and the natural resources. It also had decisional power on the membership methods to adopt for belonging to such group. This village assembly embodies the strong link that the Sami people share with the environment they live in, since the *siida* is based on a common law that keeps into consideration the rhythms of the nature and of the animals. Thus, due to common law, decisions regarding a single individual in the *siida* were not to affect the entire community. In Poggeschi, Giovanni et alia, *Rischi e potenzialità del dialogo costituzionale globale Per la costruzione di un 'itinerario' geo-giuridico mediante la comparazione nel diritto pubblico*. Napoli: Edizioni Scientifiche Italiane. 2015

inefficient reindeer herding activity), but also cultural: the Sami communities are unable to enjoy their rights because they cannot pursue reindeer herding in their traditional ancestral lands according to their customary law<sup>93</sup>.

Since arbitrary state regulations should not interfere with a custom-based activity, the *Nordic Sami Convention* ratified in 2005 declared, in Art 43 (1), that “custom is the base for Saami reindeer herding grazing rights, also across national borders”, and in Art 43 (3) that “such rights based on custom take precedent over any state treaty on cross-border grazing rights”<sup>94</sup>. Thus, the *Convention* erases the artificial national borders to promote and implement the reintroduction of the Sami customary law, at least as far as reindeer herding is concerned, restoring the regulations contained in the *Lappkodicill*.

### *Mining*

Mining is an activity that has recorded an increasing and stable presence in the Northern lands in the last decades and that is now, more than ever, severely jeopardizing the principal Sami livelihood seen in the previous paragraph, reindeer herding. This activity, usually performed by international commercial companies rather than States, draws foreign interests due to the rich deposits of valuable minerals, gas and oil, whose demand is notably growing in modern societies; the extractive industries, then, involve three parties, the State, the indigenous communities and the international companies, making the legal relationships of rights and obligations blurred and uncertain. It is exactly at this point that indigenous peoples are forced to face issues within their own borders: the extractive operations deprive the land of those spaces for pasturing and of those natural resources that are absolutely necessary for indigenous tribes not only to practise reindeer grazing, but also for their own basic vital needs and daily subsistence<sup>95</sup>. As a consequence of this eagerness showed by commercial companies,

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<sup>93</sup> Åhrén, Mattias. Scheinin, Martin. Henriksen, John B. “The Nordic Sami convention: International Human Rights, Self-Determination and other Central Provisions”. *Gáldu Čála – Journal of Indigenous Peoples Rights* no. 3/2007. Pg 22. Magne ove Varsi Editor.

<sup>94</sup> *Ibidem*.

<sup>95</sup> An essential characteristic of indigenous peoples indeed lays in the fact that they are indissolubly linked to the rural and vulnerable territory they live in and depend on the natural resources that this can provide. This concept is the very content of several articles included in both the *International Covenant on Civil and Political Rights* and in the *International Covenant on Economic Social and Cultural Rights*. It is considered as a collective right and a central aspect of self-determination, since it closely associated

many violations of rights have been recorded to the detriment of the indigenous populations of the area (such as water pollution, forced relocation of people and the misappropriation of lands that should be used for reindeer grazing and breeding), along with violations of the laws for the biological safeguard. So far, several entities within the United Nations have been spending innumerable efforts to protect this minority fringe of the population in their right to the management of the land and the resources it contains, but the concerns still represent considerable issues on the international scene.

In the Special Issue of *the Nordisk Miljörättslig Tidskrift* (Nordic Environmental Law Journal) of 2014<sup>96</sup>, Susann Funderud Skogvang mentions a conflict that took place in Sweden and that is “[...] illustrative of the controversy surrounding mining in vulnerable areas and on reindeer pasture land”: the *siida* of *Vapsten* in the area of *Rönnbäcken*. Labba then takes the analysis into a deeper level in her essay “Mineral Activities on Sámi Reindeer Grazing Land in Sweden”<sup>97</sup>. She singles out several differences between Sweden and the other Nordic countries that actually give the international commercial companies an appealing incentive in investing in this country’s resources: the increase of mines in 12 months can gradually grow in a remarkable way; and, as compared to other countries, “Sweden has a good investment climate with low taxes on minerals and good institutional conditions for mining activities”.

In her essay, she digs into the *Rönnbäcken* case to illustrate some legal and practical challenges to the detriment of the Sami community of the Swedish *siida Vapsten*. Despite the claims of the Sami people and the formal request for the Sami Parliament’s appeals, the Swedish government rejected them in 2013 and successively agreed on the concession of three open pit mines to the private extracting company. It is interesting to notice here that the decision that guided the Government in such a legal decision is based on a prudent judgment on the content of the Swedish Environmental Code and the

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to the right of a people not to be deprived of its own means of subsistence. However, this right creates issues when interacting with the right to sovereignty of the State. The results of this interaction are of particular detriment to the indigenous communities working in the rural area, leading to lack of access to basilar resources and, ultimately, means of subsistence. While the State has the right to sovereignty over said lands, it is also true that this power is limited in his extent within the benefit of its population, since the State has the legal obligation to ensure a beneficial exploitation of the natural resources for its people.

<sup>96</sup>*Nordisk Miljörättslig Tidskrift/Nordic Environmental Law Journal*, Special issue: Extractive Industries in the North: What About Environmental and Indigenous Peoples Law?, pg. 13-14, 2014.

<sup>97</sup> Maria Kristina Labba in *Nordisk Miljörättslig Tidskrift/Nordic Environmental Law Journal*, Special issue: Extractive Industries in the North: What About Environmental and Indigenous Peoples Law?, pg. 93, 2014.

Minerals Act; the decision was indeed to be taken out of a balance between the two official documents, the former stating the national importance of both reindeer herding and mining activities, and the latter granting such concessions to the private extracting companies. “According to the preparatory work short-term economic motives shall not override essential values of public interest which depend on the land area of national interest”<sup>98</sup>, affirms Labba, hence the decision of the Government of apparently giving more relevance to the mining activities than on the Sami people’s traditional livelihood. This is only one of the cases (let us not consider the other Nordic countries here) that prove a striking yet crystal clear contradiction: on one side, the indigenous party calling on land exploitation and a devastated, left-behind territory; and on the other side, the positive creation of job opportunities for many people in the northernmost regions and the following economic benefits on a wide scale.

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<sup>98</sup>*Ibidem*, pg. 96.



### *Health conditions*

A discrete amount of research, especially in the last decades due to the rising of new diseases and severe health cases, have been carried out on the health situation of the Sami people, giving positive results for what the incidence of particular diseases are concerned. Despite this, “most of the published researches on health and diseases among Sami were fractionated, unsystematic, and anecdotal”, Per Sjölander states<sup>99</sup>, according to his studies conducted in the Southern Lapland Research Department, located in Vilhelmina, Sweden. To enrich the knowledge on the field, the researcher makes a comparison between three parties, the Sami communities’ health conditions, the other indigenous people in the circumpolar region, finding no evidence of substantial differences but, at the same time, spotting some interesting connections with some pathologies apparently connected to social factors, especially among the reindeer-herding Sami; most of the problems have indeed their origin in marginalization and lack of knowledge. Sjölander analysed, for example, the incidence of mental health issues in the members belonging to the indigenous population, with a special focus on Sami children and adolescents in northern Norway. Despite the mental health conditions among Sami<sup>100</sup> and non-Sami adolescents are equally good, the author highlights how the rates of risk-taking behaviours and eating disorders are less frequent in the first group rather than the second one; the reason can be deduced from the “healthy” cultural environment and the related values that the Sami community transmits to the offspring within the group. This finding may lead to a potential explanation of another very interesting case: the comparison between the suicide rates of the Sami and non-Sami people in the southern and northern reindeer-herding districts of Sweden. According to the study, the first group, located in the northern thus more remote and extreme regions, present a lower rate of suicide incidence than the one in the southern; it can be thus deduced that the strong culturally impregnated bond present in the northern districts’ family groups may be the key to the case. However, on a general note, Sami reindeer-herding men showed a “significantly higher risk for fatal accidents and suicide, risk

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<sup>99</sup> Sjölander, Per. “What is known about the health and living conditions of the indigenous people of northern Scandinavia, the Sami?” *Cluster: Vulnerable Populations in the Arctic*. Southern Lapland Research Department, Vilhelmina, Sweden. 2011

<sup>100</sup> Living in an environment with a strong Sami culture, rather than a weak one.

elevations that increased over time”<sup>101</sup>. This data match and surpass the information related to risk exposure’s data for farmers and construction workers, two occupations with relatively high rates of severe accidents in Sweden, making the reindeer-herding men’s death rate the highest. Another influential element that has to be taken into consideration is the alcohol intake. If we study the analyses of all unnatural death among reindeer-herding men between 1961 and 2011<sup>102</sup>, we notice that suicides form 23% of all deaths, a considerable data. What is really meaningful here is that half of the victims tested positive for alcohol, with a relevant percentage of them documenting alcohol abuse. Finally, Sjölander claims that the reason is the outdoor lifestyle the hard working conditions., which are characterized by high social and economy pressure and an extensive use of dangerous vehicle.

This data match the ones reported among Sami men in both Finland and Norway, in which “the excess risk is probably a consequence of marginalization of the Sami culture and lifestyle in the Scandinavian countries”, as it was advanced for mental health in the lines above. As a final remark, the geographic distribution is also to be taken into account: the reindeer-herding activity receives more social pressure in the southern regions rather than in the rest of the country.

On a final note, white-collar occupations with a higher amount of responsibilities are not excluded from the list of occupations at risk. Some of the issues reported by both Swedish Sami men and women indiscriminately are: high job demands; low level of social support; reduced decision power; poor communication; dissatisfactory workload and its unevenly distribution; shortage or appreciation, help, and support from other members of the same Sami community (due to the competition among Sami families in the reindeer-herding field); generally lower income.

Fortunately, the situation has been developing into better conditions in the last decades, but more efforts are necessary on the government to reduce the gap between the Sami

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<sup>101</sup> Courtesy of the Swedish Causes of Death Register, which used to examine life expectancy and specific causes of death among reindeer-herding and non-reindeer-herding Swedish Sami over the period 1961-2000 in Sjölander, Per. “What is known about the health and living conditions of the indigenous people of northern Scandinavia, the Sami?” *Cluster: Vulnerable Populations in the Arctic*. Southern Lapland Research Department, Vilhelmina, Sweden. 2011

<sup>102</sup> Using autopsy records at the National Board of Forensic Medicine, police reports, and medical records at the County Council.

and non-Sami situation work opportunities, and also to grant more rights and fair treatment. The social pressure is still on a high level and, as we have seen, many other social factors are still rampant in determining an increase in Sami people's suicide percentage.

## *2.2 The political dimension of Sami people*

This section aims at introducing some general reflections on the political dimension concerning the rights' protection and both national and international representation of the Sami people, inside and outside Scandinavia. This concise review brings the historical and the political dimensions together and combines them to introduce the legal instruments available to Sami people for the protection of their rights. A socio-historical context will also encompass and lead our investigation.

Assimilation practices were promoted among the Sami and other indigenous populations during the XXth century and were abandoned only in the 1970s, when the tribal minority groups could start movements to regain their rights on their territory's natural resources. New political policies and instruments were created, for instance, by Sami people –a remarkable example is the Nordic Sami Council in 1956, as Timo Koivurova states in his essay “The Draft for a Nordic Sami Convention”<sup>103</sup>. This inspirational wave represented, in the following years, the starting point for many other indigenous communities and their right to self-determination.

In the case of the Sami people, the first step towards the recognition of their claims has been the creation of the Sami Parliament, which represents the joining link between the minority and the dominant fringes of the population. Three Parliaments have been established, one in each Nordic country –Sweden, Norway, Finland. As for Russia, the indigenous side is organized only through NGOs. In addition to these geographically separated instruments, in 2000 the international indigenous scene welcomed the birth of the Sami Parliamentary Council<sup>104</sup>, whose ultimate purpose is to help connect and unite into an only body the weak fragmentary voices of the Sami people living in the three

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<sup>103</sup>Koivurova, Timo. *The Draft for a Nordic Saami Convention*. Pg.1

<sup>104</sup> Different from the Sámi Council, a central Sami non-governmental organization.

Nordic countries<sup>105</sup>. (It may be argued the reason why such Parliaments were created, although they may be seen as extra political “layers” within the national level; despite this potential standpoint, their creation was considered absolutely necessary due to the lack of access on the Sami people of the international means of self-determination through a direct channel and to their will to make their opinions relevant to the superior decisional mechanisms).

Sara Memo<sup>106</sup> offers a refreshingly simple set of notions for what the Sami Parliaments are concerned. For instance, she writes that “Sami Parliaments are established through different (but homologous) institutional devices whose common aim is promoting Sami cultural identity at an “advisory” level through general political representation assemblies”. This fundamental feature of the Sami Parliament greatly differs from the main characteristic of a common national Parliament: the Sami Parliament’s resolutions are not politically binding, but on the contrary “they represent a complementary, indirect, tool for influencing the public sphere on Sami’s related cultural issues and indigenous matters” –hence their *advisory* status.

Mauro Mazza also dedicated several pages of one of his works on Polar Law to give a satisfactory overview on the Sami Parliaments and their functions<sup>107</sup>, and, on a more general note, on how the indigenous peoples can participate in the national debate. He especially insisted on the distinction between *direct* and *indirect* channel to stress the importance of the Sami Parliaments. To begin with, Mazza investigates the general attitude of indigenous people towards said direct channel, which is represented by the right to vote the members of the national Parliaments. Acknowledging that the Sami people’s vote possesses the same political power than any other citizen of the country in possess of the requisites established by the law, the indigenous community showed different reactions to the possibility of participation in the national political matters based on the indigenous policies pursued by each of the Nordic state: Swedish Sami people were among the first to openly express great scepticism towards the alleged

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<sup>105</sup> *Ibidem*, pg. 29.

<sup>106</sup> Sara Memo. *The Legal Status Of Roma In Europe: Between National Minority And Transnational People*. PhD dissertation, pg. 324, 2011/2012

<sup>107</sup> Mazza, Mauro. “Percorsi di ricerca sul diritto polare”, *Quaderni*. Pg. 145. Dipartimento di Scienze Giuridiche “Alberico da Rosciate”, Facoltà di Giurisprudenza, Università degli Studi di Bergamo. Jovene Editore, 2011.

ability of national political parties of properly representing their minority rights; on the contrary side, the Sami communities of Norway tend to be sufficiently in favour of giving their vote to the national parties; finally, the Finnish Sami people place themselves in the moderate section between the two standpoints mentioned above.

As far as the indirect channel is concerned, also going under the self-explanatory name of *Sami channel*, the three Sami Parliaments play a fundamental and unique role in the protection of their specific rights: the Scandinavian Parliaments are, indeed, the preponderant means through which the indigenous claims can reach the government desk. After the WWII, the Lappish aboriginal associations and several representatives from the Nordic academic community energetically encouraged the creation of a the constitution of the Nordic Sami Council, with the observer status within the Sami Parliamentary Council created in 2000. These two bodies support the need to maintain the so-called indirect channel through the Sami Parliament, which is reason why the link between the three Sami Parliaments and the Sami Parliamentary Council is very close –to the extent that the three Sami Parliaments take turns for the presidency of the Sami Parliamentary Council.

From a technical point of view, there are no special formalities for the elections of the members of the indigenous Parliaments. The Laplanders who wants to exercise their right to vote can do it by enrolling in a designated list, whose members belonging to the Sami ethnicity become simultaneously both voters and candidates. (Such enrolment is not compulsory in Norway and Sweden). Details on each Parliament will be offered below:

- *Finland.* In 1972 the indigenous Sami Parliament was created after a joint deliberation of two of the most important indigenous associations, *Lapin Sivistysseura* and *Sammi Litto*. Finnish pro-indigenous policies have always been promoted by the national public authorities, even before indigenous explicit claims, facilitating cooperation. The Finnish Sami Parliament is composed of twenty-one members and four substitutes. The mandate lasts for four years. The President and the two Vice Presidents are elected by the members of the indigenous parliamentary Assembly.

- *Sweden.* After the formation of the first two fundamental Lappish associations, *Same Ätnam* and *Svenska Samernas Riksförbund*, the indigenous claims for self-determination started to increase, leading to the formal request for the creation of an indigenous Parliament in Sweden. Thanks to the *Sami Assembly Act* of 1992, the establishment of *Sametinget* was completed. Its functions are only advisory and it is composed of thirty-one members, whose mandate lasts for four years. The President of the indigenous Swedish Parliament is elected by the government of the Kingdom of Sweden.
- *Norway.* After the establishment of two essential associations for the protection of Norwegian Sami's rights, the *Norske Reindriftssamers Landsforbund* (in charge of reindeer-herding rights) and the *Norske Samers Riksforbund* (rights in general and land rights of all the Norwegian Sami peoples), the creation of the Sami Parliament, also called *Sametinget*, took place, thanks to the *Sami Act* of 1987. The indigenous Parliament is formed of thirty-nine members, whose mandate lasts for four years. The unique feature of the Norwegian indigenous Parliament lies in its composition: the three traditional Norwegian parties are also represented in the Sami Parliament.<sup>108</sup>

### 2.3 The Scandinavian countries— Relevant social and historical anecdotes

After having shaped a general framework from the cultural and then the political point of view of the Sami people in the Scandinavian countries, the following lines will display several interesting points focusing on Sweden, Norway and Finland, in order to offer some additional in-depth information useful for understanding how Nordic States shaped their policies on minorities throughout the last century.

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<sup>108</sup>Through members who were included in lists formed in agreement with the national Norwegian parties.

### *The Kautokeino rebellion*

The Kautokeino rebellion is arguably one of the most iconic -and violent- socio-historical events involving the indigenous struggle towards self-determination and, as the name suggests, it took place in a small village, Kautokeino<sup>109</sup>, located in the northern Norwegian region.

In order to fully understand the causal dimension of the events that led to such a sudden uprising and, consequently, to such a violent backlash, a clarification of historical nature needs to be made. Norwegian Sami people came from a past burdened with stories of repression and privation, that reached its climax from 1850 to 1980 with the so-called *fornorsking*, or *Norwegianisation*<sup>110</sup> period. The Kautokeino rebellion, that took place in 1852, marked the beginning of the tensions between the poor minority Sami communities and the wealthy dominant non-Sami population. In her essay, Adriana Margareta Dancus<sup>111</sup> dedicates several pages to include a brief account of the happenings based on Ole Henrik Magga's, professor at the Sami University College and Sami politician.

On November, 8<sup>th</sup> in 1852, a group of Sami living in Kautokeino killed the local tradesman and liquor dealer Carl Johan Ruth and the sheriff Lars Johan Bucht, burning down the tradesman's house as well. They then poured out their anger on other public figures, Reverend Fredrik Waldemar Hvosllef, his wife, child and the servants. In order to stop the rebel, schoolteacher Clemet Gundersen came from the nearby village of Ávzi with a group of villagers and managed to interrupt the violent act and to also free the hostages. The culprits were harmed too: one of them, Marit Rasmusdatter Spein, died, as well as Aslaksen Somby on the way to be processed in Alta, after reporting severe injuries. Two years after, the Supreme Court of Justice sentenced five of the rebels to death; of the rest of them, four of them were acquitted, three others died, and the rest were condemned to penal servitude. The sentence was then changed for three of the five

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<sup>109</sup> In Sami, *Guovdageaidnu*.

<sup>110</sup> Mazza also listed the division of subperiods during the *fornorsking*: *transitional phase*, *consolidation phase*, *culmination phase*, and *termination phase*. Mazza, Mauro. "Percorsi di ricerca sul diritto polare", *Quaderni*, pg. 121, footnote 12. Dipartimento di Scienze Politiche "Alberico da Rosciate", Facoltà di Giurisprudenza, Università degli Studi di Bergamo. Jovene Editore, Napoli. 2011

<sup>111</sup> Dancus, Adriana Margareta. "Ghosts Haunting the Norwegian House: Racialization in Norway and The Kautokeino Rebellion". *Framework* 55, No. 1, Spring 2014, pp. 121–139. Copyright © 2014 Wayne State University Press, Detroit, Michigan.

accused to lifelong penal servitude. The two remaining were sentenced to death by beheading and executed on October, 14<sup>th</sup>, 1854.

As the author states, the revolt in Kautokeino “is the first and last recorded confrontation between the indigenous Sami and the Norwegian majority that resulted in casualties”. While this is an obvious fact, the exact cause for this violent uprising is still uncertain. Many ideas have been circulating. Some speculate, for example, that the main cause was the leader of the revolt’s desire of vengeance and hateful feelings. Others claim that religious fanaticism was induced by a misinterpretation of Lappish preacher Lars Levi Laestadius’s words –who indeed recommended to ban alcohol. Some others bring medical reasons to the issue, advocating mental health genetic problems affecting the culprits. Geopolitical reasons were suggested too, stating that Russia’s move – closing border between Finland and Norway in 1852- may have led the Sami of Kautokeino to economic struggles and ultimately to the unbearable tension that started the revolt. Last, as outlined in the first lines, another widely spread theory sees such revolt as a manifestation of the general discontent of the indigenous population towards the Norwegian assimilation practices.

As Dancus notes, these theories all come from reliable yet biased sources, such as the hegemonic point of view of Norwegian government (2014:132). Nils Gaup, a Sami film director native from Kautokeino, shot a movie (*Kautokeino-opprøret* or *The Kautokeino Rebellion*, 2008) exposing the other side of the story in order to give a voice to the minority group. Regardless of the exact causes behind this historical event, the Kautokeino rebellion has been a taboo within the Sami community for a long time. To the Norwegian media’s questions about the motivation that moved him to dig into such an obscure, violent and controversial story, Gaup replied:

The Sami revolt in 1852 was taboo. It led to murder and it affected people for more than one hundred years. It was absolutely not a topic of conversation. This, of course, attracted my attention even more. I saw that this was a great tragedy. I started to see pictures. The men were decapitated—a horrible ritual during which hundreds of people had to watch the heads being chopped off—that is something that stayed in people’s consciousness for a long time. In fact, the Sami political movement did not start until sometime in the 1950s, approximately one hundred years later. During all that time people had an



immense (*voldsom*) respect for the authorities. To this day, people in Kautokeino respect the authorities highly. (Dancus, 2014:132)

### *The Reindeer Husbandry Act and the Kitok case*

A remarkable political achievement that involved the Swedish Sami was the *Reindeer Husbandry Act*, signed in 1971. This law was specifically intended and designed in order to preserve and benefit the fragile economic rights of the indigenous community by allowing the Sami people belonging to the villages (around 2500 people) to practise reindeer herding as their full-time occupation for their own sustainment.

This governmental law gave birth to a controversial issue, mentioned in the title of this paragraph, involving Ivan Kitok and the Swedish Crown<sup>112</sup>. Mr. Kitok, a Swedish citizen of Sami origins, claims that he

belongs to a Sami family which has been active in reindeer breeding for over 100 years. On this basis the author [Kitok] claims that he has inherited the "civil right" to reindeer breeding from his forefathers as well as the rights to land and water in Sörkaitum Sami Village.<sup>113</sup>

However, despite these premises

In an attempt to reduce the number of reindeer breeders, the Swedish Crown and the Lap bailiff have insisted that, if a Sami engages in any other profession for a period of three years, he loses his status and his name is removed from the rolls of the lappby, which he cannot re-enter unless by special permission.

This sentence can only partially explain why Mr. Kitok failed the lawsuit against Sweden. Despite Mr. Kitok's claims were based on a supposed violation of Art 1 and 27 of the *International Covenant On Civil and Political Rights*<sup>114</sup> by the Swedish government, it was proved that such violation had not be committed; in reality, it was the Sami village the authority that denied such right to Mr. Kitok through denying his membership. However, the village granted the right to breed reindeers and other traditional rights to Mr. Kitok, because of his undeniable Sami roots, thus proving again

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<sup>112</sup> The full record of the sentence is available at <http://hrlibrary.umn.edu/undocs/197-1985.html> .

<sup>113</sup> *Ibidem*.

<sup>114</sup> Even though Kitok did not practise the activity of reindeer herding for more than 3 years, thus losing its privilege of belonging to the Sami village, he affirmed that it represented a violation of the aboriginal *ancestral* right to access the natural resources of the territory.

there no violation of Art 27 had been perpetrated. At this point, Mr. Kitok condemned the village's decision because he only had access to some of the rights of Sami people, transforming him into some sort of *half-Sami* –and implying a possible dichotomy between *half-Sami* and *full-Sami* and jeopardizing the actual definition of Sami people. However, the true reason why Mr. Kitok was excluded from the village membership is of economic reason, due to the intentions of the wealthier land owners of the traditional village not to accept new reindeer farmers easily and increase the already severe competition<sup>115</sup>. As a result, the Working Group of the Human Rights Committee stated

[..] that a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole. After a careful review of all the elements involved in this case, the Committee is of the view that there is no violation of article 27 by the State party. In this context, the Committee notes that Mr. Kitok is permitted, albeit not as of right, to graze and farm his reindeer, to hunt and to fish.<sup>116</sup>

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<sup>115</sup> Mazza, Mauro. “Percorsi di ricerca sul diritto polare”, *Quaderni*, pgg. 74-87. Dipartimento di Scienze Politiche “Alberico da Rosciate”, Facoltà di Giurisprudenza, Università degli Studi di Bergamo. Jovene Editore, Napoli. 2011

<sup>116</sup> See reference at footnote 28.



## PART II

### Chapter 3

Across the globe, indigenous peoples are and historically have been marginalized, existing largely outside the political structures of the nation-states that have formed around them. Statistics demonstrate that today they are among the world's poorest, unhealthiest, and least educated people.<sup>206</sup> In addition, they are often subjected to violence and the loss of livelihood and property. Ongoing discrimination is a key contributor to indigenous peoples' shared oppression, particularly as nation-states authorize mineral exploration and extraction on indigenous lands, oftentimes without consultation, consent, or compensation.<sup>117</sup>

In Part I, the focus of the reflections provided was the creation of a social and political framework offering specific tools, such as technical terminology and cultural notions, that could prepare a solid base for the detailed historical analysis of Part II.

The development of natural and human rights into civil constitutional rights; the definition of *self-determination* and *people*; the difference between *indigenous people* and *minorities*; the holistic spiritual vision of nature according to the indigenous tribes; the guidelines for Polar Law; the Kautokeino rebellion; these are only some of the fundamental themes addresses in Part I that are going to be recalled and enriched with new collateral concepts.

The content of the two chapters ahead, as already mentioned in the first lines, is of historical nature. Chapter 3 will offer a broad overview of the -both positive and negative- historical events that involved the indigenous peoples, and consequently the Sami population. Stretched along the centuries, the struggles, the times for deprivation and oppression, but also the gradual development of a social and cultural unified awareness of the concept of *people*, and the political achievements that witnessed their ancestral rights recognised once and for all, find place in this chapter and in the following one; Chapter 4 will indeed be a suitable and punctual continuation of Chapter 3, but it will draw the attention on the modern and contemporary historical phase

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<sup>117</sup> Carpenter, Kristen A. Riley, Angela R. "Indigenous Peoples and the Jurisgenerative Moment in Human Rights". *California Law Review*. Volume 102, Issue 1. 2014

revealing the current situation and introducing the future achievements in program. The chronological pattern chosen for this section of the dissertation assumes to explain and describe why penetrating into the historical events and tracing the original formation of a conception of *dominant* and *minority* is of paramount importance for the comprehension of the current political unbalanced link between national States and indigenous peoples.

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Self-determination in both its forms, *internal* and *external*<sup>118</sup>, is a fundamental right that has been claimed for centuries by indigenous peoples. To recall the notions that have been provided and described in Part I, the designation of the term *indigenous peoples* lies on the fact that

their ancestral roots are embedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. Furthermore, they are *peoples* to the extent they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral parts.<sup>119</sup>

Depending from this conception, Anaya adds that, today, indigenous peoples represent the legacy of their ancestors on earth or, in other words, they are the living descendants of pre-invasion and pre-colonization inhabitants of their traditional lands, now under the control of a dominant superior form of government.

It is from the encounter between the aboriginal communities and the European settler societies, that took place half a millennium ago, that the notions of territory, nation, and people, and the dichotomy between dominant and subjugated radically changed their meaning. When Europeans landed in the new American territories and met the local communities, they also experienced a new approach to nature, new political institutions, and a new public organization. However, instead of respecting such social approaches,

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<sup>118</sup> We remind that the *internal* right to self-determination is the right to autonomy and self-government. The *external* right to self-determination equals secession, thus independence from the dominant State.

<sup>119</sup> Anaya, S. James. *Indigenous Peoples in International Law*. Oxford University Press. 1996

the settler societies imposed their power in many ways; first of all, they claimed the indigenous lands as their own, without taking the prior presence of the local communities into account; second, they overpowered the indigenous communities' power, so as to impose their own form of government; third, they disrupted their economic and cultural system and forced the local communities to adopt their own social orders and cultural paradigms. However, they not only brought simple changes into the daily life of the native inhabitants; they also brought deadly diseases and the concept of slavery, which ultimately conveyed the concept of human rights' violation in a striking way.<sup>120</sup>

Lenzerini<sup>121</sup> highlights a fundamental factor that effectively singles out the main difference between the two parties involved in this conflict: the Western values are completely different than the vision of life and of the world that indigenous peoples possess; this is supposedly the reason why the attempt to "regulate indigenous life on the basis of Western legal and cultural stereotypes is potentially liable to kill or impair the integrity of the 'indigenous dream' ". (It is to be noticed here that the intentions just mentioned mostly led to negative consequences even if carried out in good faith, and while trying to meet what are considered as the real needs of indigenous peoples. Consequently, all the strategies and the approaches adopted by the Western cultures have failed and only resulted in the destruction and the corruption of the aboriginal populations'<sup>122</sup> ancestral cultural identity).

According to Lenzerini, four were the doctrines of approach related to the first contacts between European colonizers and indigenous peoples: the doctrine of discovery, of conquest, of *terra nullius*<sup>123</sup>, and of evangelization. These were the key points of dominant settler societies towards the ill-equipped aboriginal tribes. The first doctrine concerns the physical discovery of the new indigenous territories from a simple geographical point of view. The second and the third –the doctrine of conquest and of

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<sup>120</sup> *Ibidem*, pg. 3

<sup>121</sup> Lenzerini, F. *Reparations for Indigenous People. International and Comparative Perspectives*. Oxford University Press Inc, New York. 2008.

<sup>122</sup> Not all of the indigenous peoples of the world received such a treatment. For example, the first contacts between our modern "civilized" societies with some tribes in the Amazon took place in a relatively recent period.

<sup>123</sup> "Vacant land". In international law, it refers to considering the indigenous lands prior to any colonial presence as legally unoccupied, thus susceptible to be claimed.

*terra nullius*- refers respectively to the military move shortly undertaken after landing in the new territory and the official reason for which the colonizers' call for claims on such territory was justified. The fourth doctrine refers to the (presumed) spirit of Christian charity and thoughtfulness that colonizers infused in the process of evangelization towards the local "heretical" population, which needed salvation to escape their "barbarous" status.

The first European mission to the exploration of the Western Hemisphere traces back to the discovery of America by Christopher Columbus, in 1492. As already mentioned, this step originated the first questions on the political and moral nature of the European settlements and, especially, of their often brutal pattern. These moral and ethical discussions were embodied by two prominent European thinkers of the time: the Dominican clerics Bartolomé de las Casas (1474-1566) and Francisco de Vitoria (1486-1547). De las Casas became well-known for strongly protecting the interests of the indigenous people of the Western Hemisphere and for his work *History of the Indies*, where he recorded the oppressive regime<sup>124</sup> of the Spanish colonizers in the early 16<sup>th</sup> century that he witnessed with his own eyes. Vitoria (primary professor of theology at the University of Salamanca) supported De las Casas's ideas about the true nature of the Indians. Despite not having seen their condition in person, he recognised that indigenous people had the right to claim their traditional land; however, at the same time, he also accepted that the Europeans could exercise their power, to a certain extent, and acquire the lands of the Indians or assert authority over them. Thanks to these political reflections, the concept of international law was born, leading the way to ensuing theorists and philosophers like Hugo Grotius –considered as the leading figures in the creation of international law<sup>125</sup>.

This conception advanced by Vitoria formally clashed with the European monarchical system point of view when Pope Alexander VI granted the Spanish monarchs all the territories that were discovered by their emissaries and that were not under the Christian jurisdiction. The Pope had indeed issued the Papal Bull *Inter Cetera*, containing his strong exhortation to "overthrow" and indoctrinate those indigenous populations that were not embracing Christianity. This last factor –the self-entitled mission of bringing

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<sup>124</sup> Especially, the *encomienda* system.

<sup>125</sup> Anaya, S. James. *Indigenous Peoples in International Law*. Pg. 11. Oxford University Press. 1996

religious order into the lives of the Indians- was indeed the most important, because it gave the monarchs an unquestionable explanation for the establishment of their legal titles in the New World lands. Despite this seemingly incontrovertible argument, Vitoria invoked the same principles of the Holy Scripture, according to which “the Indians of the Americas were the true owners of their lands, with ‘dominion in both public and private matters’. Neither emperors nor pope [...] possessed lordship over the whole world”, thus rejecting the papal grant and the discovery<sup>126</sup> reasons. Notwithstanding, Vitoria then seemed to contradict himself by stating that the Spaniards could legitimately assume authority over the indigenous tribes for the indigenous peoples’ own interest, since they “are *unfit*<sup>127</sup> to found or administer a lawful State up to the standard required by human and civil claims”. (Vitoria presumably sought some form of balance in his statements, since he affirmed it but not entirely embrace nor condemn it). In reality, this measure was mostly taken by monarch to take possessions of the land and the properties of the aboriginal village, not to mention to take over the very population to enlarge the State’s slave “pool”.

A new era came, bringing a modern conception of independent state, in 1648, due to the Treaty of Westphalia and the end of the political hegemony established by the Roman Catholic Church. This led to the introduction of a double system composed of natural rights of the individuals and natural rights of the states, involving the single person and their personal rights for the first time in international law. The post-Westphalian concept of the law of nations has been extensively explored by the Swiss diplomat Emmerich de Vattel (1714-1769) in his treatise *The Law of Nations, or The Principles of Natural Law* (1758), defining it as “the science of the rights which exist between Nations and States, and of the obligations corresponding to these rights”. Insisting on the notion and functions of natural law, he distinguished between the consequences of appliance of natural rights to states and to individuals –thus creating a dichotomy between the two.

In this way, the Western set of notions related to natural law were substituted by a pair of concepts underpinning the personal rights of the individual on one hand, and the rights of the states as a whole on the other. Vattel’s assessment that “nations are free,

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<sup>126</sup> As Grotius affirmed, “discovery applies to those things who belong to no one”.

<sup>127</sup> Italics added.



independent and equal” underlines a that each of them should be able to control its own citizens without the other Nations interfering.

However, the idea of nation-state cannot be fully applied to non-European aboriginal peoples, Anaya warns. Since the post-Westphalian establishment of nation-state finds its basic guidelines in the European political and social organization models<sup>128</sup> characterized by a central authority and exclusivity of the territory, indigenous people’s “tribal and kinship ties” and confederation-like institutions could hardly fit in the European configuration. Despite this impossibility, steps towards the recognition and the consideration of indigenous peoples from an international dimension into the public national law order have been infused into a fundamental document: the *Lappekodicillen*, ratified by Norway, Sweden and Finland in order to recognise the Nordic indigenous people’s entitlement to the transnational reindeer herding activity and to their own internal institutional organization<sup>129</sup>. Even though this document does not involve the whole indigenous peoples around the world but only a minority of them (the Sami community), it clearly shows the will of the modern States to recognise them as peoples with rights –and obligations.

The wave of change that overwhelmed Europe and the rest of the world after the peace of Westphalia eventually underwent another major evolution, at the end of WWII, with the imposition of another conception of law perpetrated by the Western countries. After the conflict, the stress that had always been put on the nationalistic emphasis was shifted towards a new interest for individual rights, as proven by some international documents of the time, i.g. the 1948 *Universal Declaration of Human Rights*. While in the first part of the XX<sup>th</sup> century the minority issue seemed to be solved –even though not successfully, as Poggeschi underlines<sup>130</sup> - through bilateral treaties, after the second

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<sup>128</sup> Whose basic prejudice is fostered by Vattel himself, hence its biased statements.

<sup>129</sup> Mazza, Mauro. “Percorsi di ricerca sul diritto polare”, *Quaderni*, pg. 128. Dipartimento di Scienze Politiche “Alberico da Rosciate”, Facoltà di Giurisprudenza, Università degli Studi di Bergamo. Jovene Editore, Napoli. 2011

<sup>130</sup> Poggeschi, Giovanni. *I diritti linguistici. Un’analisi comparata*. Pg. 23. Diritto e Politica/5. Carocci editore, April 2010.

worldwide conflict the approach towards the system in effect at the time changed due to two factors:

1. The treaties only protected those minority groups that have a country of reference (*kin-State*) outside their national borders.
2. Said treaties were potentially destabilising, since the *kin-States* could invoke the missed implementation of the treaties to invade the country in charge of such violation in order to protect their “compatriots”.

As a consequence, the specific rights of the minorities were sacrificed over the rise of universal individual rights -and the same destiny had language rights, even though a partial exception came from Art 27 of the *International Covenant on Civil and Political Rights*<sup>131</sup>. Therefore, it should not surprise that the first researchers on the rights of linguistic minorities supported international law, such as Francesco Capotorti, who was among the first to give a proper and complete definition of the term “minority”.

Marco Bussani analysed this historical situation and the change of the political status of individual rights in his work “Il diritto dell’Occidente. Geopolitica delle regole globali”<sup>132</sup>. The main focus of the author is the way in which law<sup>133</sup>, in the field of the problems related to globalisation, became the main instrument used by the Western powers to obtain self-legitimacy and their primacy in the jurisdictional field on a global scale. According to Bussani’s thesis, law is a structure where politics and economics work according procedures strictly linked to that entity shaping them. On the contrary, he highly criticizes the Western’s notion of law, where it is considered as a mere technical instrument, whose technical ability lies in its total dependence from the logics of power developing it. Furthermore, he condemns the Western’s attempt to impose a unified legal scheme, supposedly doomed to failure since no legal system can be forced from above without taking into account its deep connection with the local dimension

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<sup>131</sup> Art 27 of the *Covenant* states: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”.

<sup>132</sup> Bussani, Mauro. *Il diritto dell’Occidente. Geopolitica delle regole globali*, Einaudi, 2010. Review by Ilaria Durigon, Università degli Studi di Padova. *Universa. Recensioni di Filosofia* - Anno 1, Vol. 1 (2011)

<sup>133</sup> In the author’s opinion, every single rule that a state adopts to organise itself.

and the traditional and historical heritage of the country. The technical feature of law was evident, according to Bussani, in the US policies, whose *common law*'s use of foreign legal cases and export and diffusion of foreign terminology allowed the country to access the privileged position of global monopolistic example in justice.

Undoubtedly, this kind of legal scheme, in which the local dimension and the all-different cultural and historical varieties are uniformed into one entity inside and outside the Western hemisphere, is not suitable to promote and support the minority groups' needs. In particular, some specific categories of said minority groups, such as women and children, still encounter bigger difficulties in asserting their rights. These *iperminoranze*<sup>134</sup> –a label suggested by Poggeschi<sup>135</sup>– represent the most endangered and disadvantaged groups facing this uniformity of legal treatment, especially when taking into consideration that minorities' conditions are jeopardized on a daily basis in their attempt to obtain more legal exposure due to capitalistic logic.

### *3.1 The 1957 ILO Convention No. 107 on Indigenous and Tribal Populations*

In the twentieth century, the national relevance of the indigenous matter emerged again on the international scene with stronger determination, asking for more defined international regulations on the topic. The deprivations, the violations of human rights, and the violent measures in detriment of the indigenous communities were only some of the elements that started a process of reconsideration of the now “politically incorrect” state policies towards the minorities. The very core of such new way of thinking, endorsed by US President Theodore Roosevelt, planned the complete and irreversible assimilation of the indigenous communities into the Western social and cultural standards; probably the most remarkable example of this policy is the “Stolen Generation”, seeing the Australian Aboriginal children literally stolen from their families to enter *ad hoc* board schools to *become* European.

This ethnocidal approach based on excessive paternalism was eventually embodied by the 1957 ILO Convention No. 107 on Indigenous and Tribal Populations. According to the “noble intentions” to aim at the “material well-being” and the “spiritual

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<sup>134</sup> A “minority in the minority”, or “minorities of the 2<sup>nd</sup> type”.

<sup>135</sup> Poggeschi, Giovanni. *Le iperminoranze*. Introduction. Lecce, 2012.

development in conditions of freedom and dignity, of economic security and equal opportunity”, the realization of the Convention is based on the

[...] progressive integration into the life of their respective countries [of those] indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community and whose social, economic or cultural situation hinders them from benefiting fully from the rights and advantages enjoyed by other elements of the population<sup>136</sup>.

As Lenzerini singles out, once presumably admitting those “noble intentions”, the assumption that the predominant lifestyle was the only right one and, consequently, the one to take as primary example, rejects the value of diversity, the strength and the wills of the peoples concerned. A substantial yet still apparently not sufficient improvement has been reached lately with the ILO Convention No 169 (1989), which places itself as a sort of rectification of Convention No 170.

During the second half of the XX<sup>th</sup> century, the international political framework related to the protection of the human rights and, especially, of indigenous rights have been characterized by an exceptional wave of first indigenous formal claims through the creation of *ad hoc* institutions and authorities. The main incentive for the arousal of this political interest was probably the result of the notoriety set by some remarkable documents during the second half of the XX<sup>th</sup> century, such as for example the *International Covenant on Civil and Political Rights*. The indigenous community that has been chosen as our topic for this thesis, the Sami people, was a particular example of initiative, since it must be remembered that one of the first worldwide indigenous institution was established by the Sami people in 1956 and it is represented by the Nordic Saami Council, later denominated Saami Council, whose main features have been already described in Part I Chapter 2 of this thesis as one of the main international tools available to Nordic indigenous tribes. Exactly 10 years after, the *International Covenant on Civil and Political Rights* would then be approved by the General Assembly resolution 2200A (XXI) of 16 December 1966, entering into force in 1976 and being an example for the early base for the draft of the *Daes Declaration* that will be analysed in detail later on in this chapter.

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<sup>136</sup> See Art 1 and sixth recital of the Preamble of the ILO Convention No 107, Lenzerini (2009:80).

### 3.2 *The UN Working Group On Indigenous Populations (WGIP) and the ILO Convention No 169*

A milestone for the recognition and the political “independence” of indigenous peoples came from a pioneer organization that first asserted the indigenous presence within the international scene by opening a direct specific channel with the United Nations: the *UN Working Group On Indigenous Populations* (WGIP). Although it was created in 1982 but has been recently discontinued and substituted by the *Expert Mechanism on the Rights of Indigenous Peoples*, this commission had a vital role for the creation of an indigenous international forum<sup>137</sup>. However, it did not possess any decisive power, since it only had an adjudicatory role. Also, it was placed at the lower grade of the political hierarchy, so that their proposition had to be previously judged by other commissions before being put into full effect. In the establishment process of the Working Group, the government of Norway and the Norwegian member of the sub-commission Asbjorn Eide<sup>138</sup> played a great role. According to Art 27 of the *International Covenant on Civil and Political Rights*, the Sami –as members of a minority group- were entitled to certain rights, hence the need to protect them. Due to the open character of this commission, the Working Group soon became a political body accepting all the complaints coming from indigenous groups whose rights had been violated or neglected. Although having set stricter standards and further defined its aims and policies, the WGIP was discontinued, as mentioned above, in favour of the *Expert Mechanism on the Rights of Indigenous Peoples* in 2008. (Some governments actually pointed out that the assignments performed by the Working Group closely resembled the ones of the *United Nations Permanent Forum on Indigenous Issues* (UNPFII). On the contrary, indigenous peoples and NGOs claimed that the UNPFII does not involve the human rights dimension, which must be absolutely maintained).

The 27<sup>th</sup> June 1989, a new *International Labour Convention* was established and now represents the foremost operative binding international regulation able to guarantee the rights of indigenous peoples –despite its full functional power depends on the

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<sup>137</sup> Douglas Sanders, “the UN Working Group on Indigenous Populations”. *Human Rights Quarterly*, Vol. 11, No. 3 (Aug., 1989), The Johns Hopkins University Press.

<sup>138</sup> An academic working at the Peace Research Institute in Oslo. He then became the first chairman of the UN Working Group.

agreements between states. The *International Labour Organisation* has dealt with the protection of the rights of indigenous communities since the beginning of the 1920s, with special reference to the work field, in order to stop discrimination and unbiased treatments towards the indigenous victims. As already stated, the ILO Convention No 169 substituted the ILO Convention No 107, which is now impossible to ratify but is still valid and operative for those States that did not “denounce” it<sup>139</sup>. At date, only twenty states ratified it<sup>140</sup>, and, in particular, Nordic states seems to adopt a cautious behaviour towards it; the proof of this fact is that only Denmark and Norway have ratified it<sup>141</sup>. Since 1991, the year in which the Convention entered into force, Finland has had the intention to ratify it, but always failed, despite announcing it as a priority, the backing up of the Finnish Parliament and putting it under the spotlight during the Sami Parliament elections in the fall 2015. As for Sweden, the Nordic state supported ILO 169 and also the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP), but it also added specified that “Sweden’s Sámi policy promoted self-determination on issues directly affecting the Sámi people, and also referred to a proposal to introduce increased consultation of the Sámi people”. Unluckily, for various reasons, many indigenous populations still lack the possibility to see even their basic claims allowed.

The major point for which the ILO Convention was substituted with No 169 is the condemnation of the paternalistic and excessive assimilation means carried on by the Western states during the previous centuries (for further references, see above in this chapter). Its foremost statement affirms the right of the indigenous peoples to “enjoy the full measure of human rights and fundamental freedom without hindrance or discrimination”<sup>142</sup>. The peoples concerned have the right “to retain their own customs and institutions” and their jurisdictional system. Linguistic rights in the field of

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<sup>139</sup> Mazza, Mauro. “Percorsi di ricerca sul diritto polare”, *Quaderni*, pg. 70, see footnote no 10. Dipartimento di Scienze Politiche “Alberico da Rosciate”, Jovene Editore, Napoli. 2011

<sup>140</sup> For the list of the ratifying states updated at 2017, see NORMLEX (Information System on International Labour Standards). Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169), available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312314](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314)

<sup>141</sup> *Ibidem*, pg. 71.

<sup>142</sup> See Art 3 of the Convention.

education are also taken into account, with a provision stating that native children have the right to be educated in their own indigenous language and culture<sup>143</sup>.

Part II of the Convention deals with land rights; in particular, Art 14 prescribes the obligation of the States to recognise “the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy”, as well as the right to have access to the natural resources “pertaining to their lands” (management and conservation included). The sole exception prescribes that “measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities”. In the most severe and exceptional of cases, the lands can actually be removed –if possible, for the shortest period of time possible– from the indigenous community’s jurisdiction, but only under adequate compensation.

As we can see from this brief comparison of the two ILO Conventions, the paternalistic core that is willingly implanted in even the foremost documents that are supposed to assure the indigenous communities’ rights is still demonstrably present in multiple fundamental articles. As long as the dominant sectors of society and the central governments believe in the insufficient potential of the indigenous communities, consequently entitling themselves to take on responsibility of the indigenous matters in first person, the political international instruments on the matter will always reflect this western-biased opinion and prevent the full expression of the indigenous needs.

To conclude, some annotations on what can be unanimously considered as the most fundamental of rights related to the indigenous people’s condition has to be made. The right concerned is the official and legally binding denomination of indigenous people for the Sami population of Finland, Sweden, and Norway. It may seem inconceivable, at first, that the most essential of rights regarding the very nature of an ethnic group, as well as the base for every other right, may be among the last to be fulfilled or communicated through a legal statement. However, the Nordic countries provided for the formal announcement only in recent times<sup>144</sup>. In 2006, Sweden declared to accept

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<sup>143</sup> See Art 27 of the Convention.

<sup>144</sup> Mazza, Mauro. “Percorsi di ricerca sul diritto polare”, *Quaderni*, pp. 117-118-119. Dipartimento di Scienze Politiche “Alberico da Rosciate”, Facoltà di Giurisprudenza, Università degli Studi di Bergamo. Jovene Editore, Napoli. 2011

the identification of the term *people* with reference to the Sami community in a notification sent to United Nations Committee on Economic, Social and Cultural Rights, whose main purpose was to demonstrate the implementation in the Swedish internal jurisdiction of the *International Covenant on Economic, Social and Cultural Rights*.

In a report sent to the Norwegian Parliament in 2008, the Norwegian government did neither mention the *International Covenant on Economic, Social and Cultural Rights* nor the *International Covenant on the Civil and Political Rights*, but only the *United Nations Declaration on the Rights of Indigenous Peoples*, in relation to the Lappish communities' self-determination claims. As was specified later, such omission had been intentional, since Norway stated that the Sami legal condition in Norway is regulated and protected by the Norwegian domestic law itself and that it should be evaluated within the Norwegian legislation framework.

In the same year (2008), Martin Scheinin<sup>145</sup> stated that the Lapplanders represent a people not because of their *indigenusness*, but rather according to international law. By doing so, the professor rejected the pre-colonisation presence factor –*ergo*, the territoriality element- as the main reason for the denomination of *people*, and claimed that the right to self-determination is to be recognised to the Sami people without the need to recognise the same right to the entire population of a certain area.

As can be seen, the three Scandinavian countries have recognised the status of *people* to the Sami minorities living within the borders of their territories, conceding full implementation to the international duties formally accepted by the States themselves<sup>146</sup>. Thanks to the great symbolic significance in terms of human rights implementation given to the indigenous issues in the latest years, the increasing interest in creating documents based on their protection has epitomized the revolutionary transformation in the approach of international law towards these new protagonists of the global legal scene. In the next chapter, the latest ground-breaking documents in terms of indigenous matters will be described and commented, leading then to the

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<sup>145</sup> At the time, Constitutional and International Law Professor at the Åbo Akademi University, Turku, Finland.

<sup>146</sup> Particularly important, since *opinion iuris* highly influences the interpretation of international law within the same relation between domestic law and international law.



introduction of the political and social achievements projected for the next years and that are contained in Part III.

## Chapter 4

As indigenous peoples have become actively engaged in the human rights movement around the world, the sphere of international law, once deployed as a tool of imperial power and conquest, has begun to change shape. Increasingly, international human rights law serves as a basis for indigenous peoples' claims against states and even influences indigenous groups' internal processes of decolonization and revitalization.<sup>147</sup>

In Chapter 3, a broad overview on some of the first most innovative and historically ground-breaking documents involving indigenous peoples have been provided and compared to the socio-historical background in which they were conceived. Thanks to those documents, the increase of the human rights' pertinence and the evolution of the indigenous political and social relevance from an international point of view have established a rather solid base for the current situation and, in particular, for the next achievements in program. Notwithstanding, it has also been noticed that the very founding international documents are still affected by an unbiased conception –whose traces are to be found in the colonization period- of the principle of autonomy and self-determination. Moreover, while the Nordic States have agreed on reaching a compromise on the jurisdictional level in order to grant the indigenous communities a certain degree of decisional autonomy in what their legal internal organization is concerned, such States are still rather reluctant in empowering the aboriginal tribes in the economic field by giving them full administrative powers in the reindeer herding sector.

Despite this apparently chronic unsatisfactory competence, the international community is still undergoing major changes, proving the revolutionary impact that aboriginal communities around the world has had on the features of the continents' policies. Some of these radical transformations, coming through in the latest years by means of new agreements and conventions, have benefitted the international scene in two ways: first, they have progressively reduced the gap between the minority fringe of the population

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<sup>147</sup> Carpenter, Kristen A. Riley, Angela R. "Indigenous Peoples and the Jurisgenerative Moment in Human Rights". *California Law Review*. Volume 102, Issue 1, pg. 173. 2014

and the dominant social sectors; second, their innovative side allowed to grow beyond the state-centred paradigm in international relations in a realistic and concrete way. This chapter's purpose is not only to introduce some of the most relevant recent accomplishments reached by the indigenous communities in general and by the Sami people specifically in the last decade<sup>148</sup>, but also to comment on their micro and macro consequences.

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“Today the political and societal standing for Saami individuals is at its greatest in all of history”; it was in 2000, only seven years ago, that Christian Jakob Burmeister Hicks<sup>149</sup> made this statement in his *Historical Synopsis*. Before the 1960's, the Sami presence on the international scene was not definite, almost invisible<sup>150</sup>; however, after the creation of a pan-Sami “artificial” movement demolishing the national walls and unifying the members of this transnational minority, the strength obtained through such coalition began to impose its presence on the global level through the national jurisdiction. Their strength also benefitted of the interaction, the cooperation and the experiences shared with other ethnic minorities around the world.

Nowadays, the political battles for the recognition of the rights show their results. There are Sami schools specialised in educating in and transmitting the autochthonous language; there are social organizations, which regularly educate and keep alive the cultural heritage; there are businesses -mainly linked to tourism- that seek economic independence; there are political parties, which most likely represent the most important organizational and relevant structure within the Sami society. (It is thanks to their

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<sup>148</sup> The *contemporary* situation taken into account in this chapter is approximately set from the beginning of the XXIth century.

<sup>149</sup> Burmeister Hicks, Christian Jakob. *Historical Synopsis of the Sami/United Nations Relationship*. *The Arctic* website, 2000. Available at <http://www.thearctic.is/articles/topics/samisynopsis/references.htm>.

<sup>150</sup> The only exception may be the Lappish collective action in the mid 1920's, then interrupted due to the negative attitude of the authorities.

constant active work that the Sami people can now boast a nearly equal living standard to that of their fellow Scandinavian citizens<sup>151</sup>).

But as Burmeister Hicks points out, “many things have yet to be resolved”. For instance, as already anticipated at the beginning of this chapter, the rights related to the economic sphere still represent the most irksome issue. Despite the great strides that the Nordic countries accomplished, for example, land claims, hunting and reindeer herding issues are continuously under lengthy multilateral negotiation. The Sami peoples still feel that most of their rights have not been granted yet, and proof of it is the unsuccessful ratification of several UN mandates and conventions.

#### *4.1 The Nordic Sami Convention*

While much still has to be done, lately several documents with international resonance have been drawing global attention and raising questions on the indigenous matters with renewed strength. Following the ILO Convention No 169’s example, one of the legal instruments application of the latest years to guarantee the indigenous claims’ fulfilment is the *Draft Nordic Sami Convention*. Arguably the greatest political achievement of the last decade, as well as the longest (340 pages)<sup>152</sup>, the *Draft* was officially presented to negotiations in Oslo on October 26th 2005, after five years from the first draft formulated by a specialized working group. Finally, in 2016 the group of negotiators has agreed on a Convention<sup>153</sup>. The initiative for its elaboration was advanced by the Sami Council, which had multiple times expressed its will to represent the Sami people as a community instead of as distinctive minority groups. After an intense preparatory phase, in 1995 the Nordic Council of Ministers decided to form an *ad hoc* working group to draft a potential future *Saami Convention*. Its composition included three members from each Nordic state and a representative from each Sami Parliament. After

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<sup>151</sup> Exceptions excluded, see Part I Chapter 2.

<sup>152</sup> Mazza, Mauro. “Percorsi di ricerca sul diritto polare”, *Quaderni*, pg.133. Dipartimento di Scienze Politiche “Alberico da Rosciate”, Facoltà di Giurisprudenza, Università degli Studi di Bergamo. Jovene Editore, Napoli. 2011

<sup>153</sup> Yle Uutiset News Website. *Nordic Sámi Convention agreement reached after more than a decade*. 23<sup>th</sup> December 2016. Available at [https://yle.fi/uutiset/osasto/news/nordic\\_sami\\_convention\\_agreement\\_reached\\_after\\_more\\_than\\_a\\_decade/9371674](https://yle.fi/uutiset/osasto/news/nordic_sami_convention_agreement_reached_after_more_than_a_decade/9371674).

years of negotiations and studies, in 2001 the members of the *Expert Committee* were appointed, equally formed by representative of the States and of the Sami community. This special committee worked from 2003 to 2005, when it finally presented a new project of *Nordic Sami Convention* in Oslo.

One clarification is absolutely necessary at this point. When mentioning the “Nordic States”, we are referring to Finland, Sweden, and Norway, but not to Russia. The Sami communities of the Russian Federation were purposely not included, since its government had previously strongly opposed the adoption by the UN General Assembly of the *United Nations Declaration on the Rights of the Indigenous Peoples*. Notwithstanding, Russia specifically disciplined the indigenous peoples’ issue in Art 69 of the Russian Federal Constitution, where the recognition of the national and cultural autonomy<sup>154</sup> is administrated. To partially mitigate this lack of involvement of the Russian Federation’s ethnic communities, the *Convention* will still apply to the Russian indigenous people living in Finland, Norway, and Sweden –thanks to the pan-Sami feature of the *Convention*.

The *Nordic Saami Convention* represents a cutting-edge example of implementation of Art 36 of the *United Nations Declaration on the Rights of Indigenous Peoples*, seeking protection for the right of the indigenous communities divided by national borders to keep contacts and cooperative relations through a supranational institution. To fulfil these requirements, this document presents some fundamental and radical characteristics. First of all, its purpose is

[...] to *confirm and strengthen*<sup>155</sup> such rights for the Sami people as to allow the Sami people to safeguard and develop their language, culture, livelihoods and way of life with the least possible interference by national borders”<sup>156</sup>.

Consequently, the *Convention*’s primary aim is not to bring any amendment to the national constitutions of the Nordic countries in relation to the land and water resources use in the Sami homeland, as well: “[t]he purpose of the Convention is to assert the

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<sup>154</sup> Among which the Sami people are included, since they are not the only ethnic minority living in the Russian territory. Until 2011, up to 41 small official recognised indigenous communities lived in Northern Russia, Siberia and the Far East. It is estimated that the actual number of the indigenous communities would be around 100 groups.

<sup>155</sup> Italics added.

<sup>156</sup> See Art 1 of the Convention.

Saami people's existing rights and freedoms in the Saami region, not to change them"<sup>157</sup>, a measure that was specifically adopted to prevent further discrimination towards this national minority -as happened in the past, when they were denied a fair and equal treatment. The *Convention* stresses not only the importance of traditional livelihoods, but also encourages tourism and modern ways of engaging in trades and businesses. Also, the Sami people have now the opportunity to participate in the planning of the management and use of the state's land and water areas, in order to support their economic autonomy. In Art 1, another duty of the *Nordic Convention* is also mentioned: it should, to the larger extent possible, prevent or mitigate the negative effects of the fact that the Sami traditional territory's nature is *transnational*, thus divided by national borders and by different jurisdictions<sup>158</sup>.

Notwithstanding, some relevant restrictions on the content of Art 3 shall be pointed out. Koiruva<sup>159</sup> and Mazza stressed that the right to self-determination of the Sami population is actually limited to internal self-determination "within existing states"<sup>160</sup>, contrary to the Finnish, Swedish, and Norwegian "regular" citizens, who can also claim their right to external self-determination<sup>161</sup>. This decision seems surprisingly controversial, since the Sami people can conclude treaties on an international level, which should not be possible if they did not have the right to secede from independent states<sup>162</sup>. Indeed, according to the three Expert Committees's study on the Annex I included in the *Draft Report*, the Sami people can effectively fulfil their right to external self-determination "via representation in international forums and in intergovernmental affairs"<sup>163</sup>: this means that the Sami Parliaments represent the indigenous community on

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<sup>157</sup> Oikeus Ministerio/Ministry of Justice (Finland) Website. *Agreement on the Nordic Saami Convention reached*. Published on December, 21<sup>st</sup> 2016. Available at <http://oikeusministerio.fi/en/index/currentissues/tiedotteet/2016/12/pohjoismaisestasaamelaisoppimuksestaneuvottelutuloshallitusvieratifoitavaksi.html>.

<sup>158</sup> Bankes, Nigel. Koivurova, Timo. *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights*. Pg. 257. Bloomsbury Publishing, 2013.

<sup>159</sup> Koivurova, Timo. *The Draft for a Nordic Saami Convention*. Pg. 110.

<sup>160</sup> *Ibidem*.

<sup>161</sup> This is also the case of Greenland. Art 19 of the 2009 Charter of Greenland (adopted by the Danish government) contains the steps for a peculiar institutional procedure for the potential access of Greenland to the integral sovereignty, thus to the full independence from Denmark.

<sup>162</sup> Still, they do have this right, but only in exceptional circumstances, according to the UN Draft Declaration.

<sup>163</sup> Koivurova, Timo. *The Draft for a Nordic Saami Convention*. Pg. 109.

an intergovernmental scale<sup>164</sup>. Consequently, the Sami people cannot create their own independent State<sup>165</sup>.

Mauro Mazza highlights some other important features offered by the *Convention* in his “Percorsi di Ricerca sul Diritto Polare”<sup>166</sup>. Without any doubt, the recognition of the right to self-determination for Sami people is the most fundamental of all rights asserted in this document. In its *Preamble*, the *Convention* clearly states that the Lappish communities form a real people, composed of the unified indigenous peoples of Finland, Norway, and Sweden, that is indivisible despite being divided by national borders. In addition, in the second part of the *Preamble*, where the declarations of the Sami Parliaments of the three Scandinavian countries are included, it is formally stated that the Laplanders are a people entitled to the right of self-determination. Along with this statement, a clarification is provided in Art 3: the Sami people possesses the right to self-determination in compliance with both the domestic law and the *Sami Convention* guidelines, with the added value of the right to freely determine their own economic, social, and cultural development, also through the economic advantages deriving from the exploitation of the natural resources of their traditional territory. On this last issue, the States’ position is not sure, since the previous (bust also current) discussions are based on how the territorial integrity is connected to the right to self-determination of the indigenous party. As Martin Scheinin noticed, “a number of states have traditionally argued that it is the State that has the permanent sovereignty over natural resources”<sup>167</sup>, hence the reluctance in the economic-based issues seeing the disposition of the natural resources by the ethnic community; for this reason, such opinion makes itself visible in the national legislation too. Despite it, most of the states still recognise the utmost importance of the traditional territory for the indigenous tribes, so that *at least some of* the rights related to the land and the natural resources are granted.

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<sup>164</sup> The Nordic states also formally commit to promote the representation of the indigenous people within the international institutions and the autonomous Sami participation in the international meetings.

<sup>165</sup> In addition to the legal reasons provided here, the territory issue would arguably represent the biggest obstacle in the recognition of the Sami people’s right to external self-determination. This is due to the transnational nature of the Sami community, fragmented in 4 different States.

<sup>166</sup> Mazza, Mauro. “Percorsi di ricerca sul diritto polare”, *Quaderni*. Pg.139. Dipartimento di Scienze Politiche “Alberico da Rosciate”, Facoltà di Giurisprudenza, Università degli Studi di Bergamo. Jovene Editore, Napoli. 2011

<sup>167</sup> Åhrén, Mattias. Scheinin, Martin. Henriksen, John B. “The Nordic Sami convention: International Human Rights, Self-Determination and other Central Provisions”. *Gáldu Čála – Journal of Indigenous Peoples Rights* no. 3/2007. Pg 78. Magne ove Varsi Editor.

As far as culture is concerned, Article 23 of the *Saami Convention* maps out the Saami people's basic language rights, while Article 24 translates those rights into state obligations. First, Art 23 declares the right of Sami people to "use, develop and revitalise their language and traditions", but also "to determine and preserve, as well as to receive public acknowledgment for, their personal and geographic names" (second provision)<sup>168</sup>. As already mentioned, Art 24 brings into force the regulations of Art 24 through the formal duty of the ratifying States to actively promote such rights. In particular, it is explicitly stated that the Sami language can be used in a jurisdictional environment, such as before courts or administrative authorities in the Sami area. The same promotion shall affect the Sami literature and its publishing, as well as broadcasting, printing and podcasting in Sami language<sup>169</sup>.

The *Convention* also addresses the health care and the social services. Similarly to the regulations in the field of language promotion, Art 29 establishes that the Sami people have the right to enjoy their culturally accustomed health and social services, with a further distinction between the Sami members whose residence is inside or outside the traditional Sami territory. Such services, according to Art 29 (1), are to be granted, within the Sami traditional area, as a duty by the ratifying states in collaboration with the Sami Parliaments "in such a manner that safeguards the Saami population residing within these areas health and social services accustomed to their linguistic and cultural background"<sup>170</sup>. Even outside the Sami traditional areas, the States must ensure their fulfilment by recognising the Sami individuals' linguistic and cultural background.

As a final analysis of the main types of rights regulated in the *Convention*, it must be noticed that all of the fringes of the Sami population were taken into consideration. Concerning children and youth, Art 30 is the only article inside the *Convention* that specifically addresses the Sami children and their education. Other articles, such as for example Art 26, state that "Saami education shall be accustomed to the Saami's cultural background" but, as seen for the health and social services rights, there is a distinction

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<sup>168</sup> *Ibidem*, pg 23.

<sup>169</sup> The same treatment must be reserved to the Sami dialects as well.

<sup>170</sup> Åhrén, Mattias. Scheinin, Martin. Henriksen, John B. "The Nordic Sami convention: International Human Rights, Self-Determination and other Central Provisions". *Gáldu Čála – Journal of Indigenous Peoples Rights* no. 3/2007. Pg 24. Magne ove Varsi Editor.



between the Sami people residing within the Sami territory and the members residing outside such area. Regarding the first category,

Saami residing within the traditional Saami territory shall be provided education in and on the Saami language. Also otherwise shall the education be accustomed to their cultural background and shall be organized in such a manner that it provides the foundation for continued studies at all levels. At the same time, however, shall the education be organized in such a fashion that it allows Saami that are active within the traditional Saami livelihoods to continuously pursue the Saami traditional lifestyle, parallel to attending school<sup>171</sup>.

While the Sami people residing inside the Sami territory have the opportunity not only to obtain a continuous education in their autochthonous language, but also to attend school without preventing their regular traditional activities and livelihoods. Art 26 (2) also regulates the education on and in the Sami language to the Sami children and youth living outside the Sami traditional territories, but “to the extent it can be deemed *reasonable*”. As regards the content of the national curricula, the Sami Parliaments will collaborate with the States in order to establish curricula “accustomed to the Saami’s cultural background and particular needs”.

From a technical point of view, the *Convention* established that, in Art 48, its entering into force was subordinated to the approval of the three Sami Parliaments. Also, the mechanisms to grant the application of the *Convention* are worth to be commented. First, Art 46 regulates the direct implementation of the *Nordic Sami Convention* into the domestic legal orders of Finland, Sweden, and Norway following the same *iter* mandated for any other national law; the Sami people can therefore claim both their individual and collective rights recognised by the *Nordic Sami Convention* in front of the jurisdictional authorities of the three Nordic countries that ratified it. Second, the second provision of Art 45 establishes that the Nordic Saami Convention Committee does not have any judiciary competence; it can only submit periodical reports to the Finnish, Norwegian, and Swedish governments on the implementation of the *Convention* and express opinions upon request of the single individuals or of the groups. In addition, the members of the Nordic Saami Convention Committee, even though they

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<sup>171</sup> See Art 29 (1) of the *Nordic Sami Convention*.

are elected by both the Nordic states and the Sami National Parliaments, they do neither represent the national governments nor the ethnic parliamentary Assemblies; on the contrary, they safeguard the general interests of the Sami community.

The Sami Parliaments<sup>172</sup> also had a principal role in the ratification process of the *Nordic Sami Convention*. According to Art 48-49 and 51 of the *Draft*, the Sami deliberative Assemblies had a veto power, so that their vote was essential not only for the ratification and the potential emendation of the *Convention* from the Nordic states, but also for the need to prevent any possible recession or lack in the protective measures standards for the indigenous rights.

In conclusion, the *Nordic Sami Convention's* relevance lies not only in its internationally recognising of the rights of the Sami people, but also in its being a primary example of assertion of their claims and needs for the other indigenous minorities. In general, the initiative of the *Convention* was well accepted and its provisions rather appreciated, especially by the Sami Council –that first suggested the creation of such agreement more than 20 years ago- and the Sami Parliaments; notwithstanding, these same institutions expressed their worry and their regret that the *Convention* did not go further in its acknowledgment of the indigenous claims. On the contrary, mixed responses came from the non-Sami associations and institutions. Universities and major NGOs expressed a rather positive support, while municipalities and public authorities representing the extracting and forestry industries strongly oppose the adoption of the *Convention* while also trying to persuade the States not to ratify it. (This shall come as no surprise, due to the higher importance that these public and private institutions attribute to the non-Sami part of the population rather than to the Sami counterpart)<sup>173</sup>.

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<sup>172</sup> For a complete analysis of the functions of the Sami Parliaments, see Part I Chapter 2.

<sup>173</sup> Åhrén, Mattias. Scheinin, Martin. Henriksen, John B. "The Nordic Sami convention: International Human Rights, Self-Determination and other Central Provisions". *Gáldu Čála – Journal of Indigenous Peoples Rights* no. 3/2007. Pg 37. Magne ove Varsi Editor.

#### 4.2 The United Nations Declaration of the Rights of Indigenous Peoples

In 2007, the modern international political system was deeply excited by the ratification of another ground-breaking document, even though still at an embryonic level, which embodies the first great step towards the full protection of the rights of all the indigenous peoples; this agreement is the *United Nations Declaration of the Rights of Indigenous Peoples* (UNDRIP), which was approved through Resolution 61/295<sup>174</sup> during the 107<sup>th</sup> plenary session of the United Nations General Assembly. And within 2010, “the most ardent dissenters, Canada, New Zealand, Australia, and the United States, all reversed their opposition and adopted the Declaration”<sup>175</sup>. The fundamental role in its elaboration that was performed by the Greek legal expert Erica-Irene Daes resulted in the creation of the so-called *Daes Declaration* denomination when referring to the UNDRIP<sup>176</sup>.

The United Nations started to draw their attention to the issue of indigenous peoples’ and local communities’ rights in the early 1970s, beginning with conceiving a formal definition for the term *indigenous*. This was then furnished in the Preliminary Report on the Study of the Problem against Indigenous Populations, submitted by José R. Martínez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. This interpretation revealed itself to be particularly interesting and relevant not only because it had been established by such an authoritative international body such as the United Nations, but also because it took in great account the importance of the ancestral territorial factor in the indigenous tribes’ customary traditions and, consequently, their rights on the land and the natural resources. These notions were also at the base of the demands made by the indigenous peoples that eventually lead to the creation of such international political protection instrument such as the UNDRIP. According to Mazza, the framework of claims

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<sup>174</sup> Cittadino, Federica. “Applying A UNDRIP Lens To The CBD: A More Comprehensive Understanding Of Benefit-Sharing” in *JOURNAL OF THE INDIGENOUS STUDIES NETWORK, SPECIAL ISSUE: Developments and Challenges of the UN Declaration on the Rights of Indigenous Peoples Five Years On: Insights on Biodiversity and Case Studies in Bangladesh, Brazil, Japan, and Uganda*. Vol. XXIV, No. 4, pg. 19. April 24, 2014

<sup>175</sup> Carpenter, Kristen A. Riley, Angela R. “Indigenous Peoples and the Jurisgenerative Moment in Human Rights”. *California Law Review*. Volume 102, Issue 1, pg. 176. 2014

<sup>176</sup> Mazza, Mauro. “Percorsi di ricerca sul diritto polare”, *Quaderni*, pg. 48-49. Dipartimento di Scienze Politiche “Alberico da Rosciate”, Facoltà di Giurisprudenza, Università degli Studi di Bergamo. Jovene Editore, Napoli. 2011. See also footnote pg. 50 for further bibliography on the *Daes Declaration*.

advocated by the native ethnic groups extend beyond the “simple” need of self-determination: it also encompass the right to reside in their traditional ancestral land (pre-colonization occupation), the right to non-discrimination and other sector-based rights, such as for example the right connected to cultural issues (*id est*, protection of the aboriginal traditional culture heritage). In reality, the right to self-determination contains the right to self-government, but not only: it also embraces human rights, cultural rights, land rights, natural resource usage rights, social welfare rights, and economic development rights.

As Federica Cittadino singled out in her essay, despite its non-binding nature, the *Declaration* is fruitful for four main reasons:

1. It is one of the foremost legal documents involving both individual and collective rights related to the indigenous world;
2. It can be a profitable instrument to better understand the content of another significant document, the *Convention on Biological Diversity* (CBD) -which deals with the shared usage of the natural resources of a territory derived from the exploitation of the traditional knowledge belonging to the indigenous peoples. (That is why indigenous peoples are seen as experts in the biological diversity knowledge and preservation, due to the spiritual nature<sup>177</sup> of their relationship with the environment they live in and Mother Earth in general)<sup>178</sup>; and
3. It addresses “in a very explicit way [...] those actors that need to ensure the implementation of the rights of indigenous peoples”, as for example in Art 21 claiming “take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions”.
4. It represents one of the most important documents targeting reparation for past wrongs towards indigenous peoples<sup>179</sup>.

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<sup>177</sup> Explicitly stated in Art 25 of the *UN Declaration*.

<sup>178</sup> Cittadino, Federica. “Applying A UNDRIP Lens To The CBD: A More Comprehensive Understanding Of Benefit-Sharing” in *JOURNAL OF THE INDIGENOUS STUDIES NETWORK, SPECIAL ISSUE: Developments and Challenges of the UN Declaration on the Rights of Indigenous Peoples Five Years On: Insights on Biodiversity and Case Studies in Bangladesh, Brazil, Japan, and Uganda*. Vol. XXIV, No. 4, pg. 20. April 24, 2014

<sup>179</sup> See Part III Chapter 5 for more details on the concept of *reparation*.

I would then proceed to analyse and comment some of the most peculiar characteristics displayed in the *UN Declaration of the Rights of Indigenous Peoples*, starting from the articles that condense the rights to of indigenous peoples to land and natural resources, traditional knowledge, and environmental protection. The starting point, as we have already seen above, is the special relation attributed to their ancestral land. Related to this topic, Art 8 subparagraph 2(j) provides for the duty of the States to prevent and immediately hold any activity aiming at evicting the indigenous communities from their territory or to prohibit their usage of the natural resources located in such geographic enclosure. Therefore, the land element is seen as the first fundamental factor for the indigenous peoples in order to preserve their right to enjoy their traditional life and customs. Other collective rights related to the land possession and its meaning for the indigenous communities are contained in Art 25-28, 30 and 32, and its importance is also stated in paragraph 22 of the UNDRIP's *Preamble*. It must be noticed here that while the *UN Declaration* deals with both the land that is traditionally owned or occupied and the territories that are "otherwise used or acquired", the ILO Convention 169 refers only to lands "traditionally occupied" (Art 14); a step forward has been thus made on the level of coverage granted to this type of rights. This is also proved by the provisions of Art 26 entitling indigenous peoples to "own, use, develop and control"<sup>180</sup> the "lands, territories and resources that they possess", thus directly avoiding to address the issue of property attribution of historically dispossessed lands. Connected to the many facets of the right to land, Art 20 highlights how the indigenous peoples are free to enjoy their own means of subsistence (obviously linked to and provided by the territory), "the conservation of their vital medicinal plants, animals and minerals" (Art 24) and to maintain and transmit all of the above as their traditional heritage.

Let us now investigate other basilar rights introduced in the *UN Declaration*. Contrary to Cittadino's interest in the rights related to environmental protection and ancestral land's importance from the native population, Mazza preferred to focus on the first provisions and on a broader field. For instance, in "Percorsi di ricerca sul diritto polare"<sup>181</sup>, he analyses the rights that derive from and resume the concepts from other

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<sup>180</sup> Legally interlocked with the right to land itself, according to Art 32.

<sup>181</sup> Mazza, Mauro. "Percorsi di ricerca sul diritto polare", *Quaderni*, pg 50. Dipartimento di Scienze Politiche "Alberico da Rosciate", Facoltà di Giurisprudenza, Università degli Studi di Bergamo. Jovene Editore, Napoli. 2011

two leading international documents, the *International Covenant on the Civil and Political Rights* and the *International Covenant on the Economic, Social and Cultural Rights*, where in particular Art 3 and 4 of the *UN Declaration* are based on Art 1 of both the above mentioned treaties. In Art 3, the text states that the indigenous peoples are entitled to the right to self-determination, whereby such peoples freely determine their political status and pursue their economic, social and cultural development. In addition, the following article contains supplementary provisions on this entitlement: due to the recognition of their right to self-determination, they shall also be granted the right to autonomy and self-government in their local domestic affairs, along with the means to economically support their own autonomous functions. It is very important to remember, at this point, that the right to self-determination accepted by the *UN Declaration* is to be considered as of the internal type, hence its political value does not influence or interfere with the sovereignty of the State where the indigenous communities reside. Art 4 was, indeed, specifically written to establish the right proportions and limitation of such request.

Further on in his publication, Mazza adds several annotations on other rights offered in the UNDRIP. For instance, Art 46 (1) represents a further step in strict connection with the rights seen above in Art 3 and 4. First, the UNDRIP state that its provisions cannot be interpreted as an implicit permission for any act contrasting the *United Nations Charter's* regulations (according to the first draft of the UNDRIP) and that they do neither authorize nor encourage any act aimed at partly or totally damaging the territorial integrity, *id est* the political unity of the sovereign and independent States.

In conclusion, the provisions provided by Art 3, 4, and 46 of the *UN Declaration of the Rights of Indigenous Peoples* seem to locate themselves as a sort of compromise between the single States, the international community and the indigenous peoples. As already outlined, the *Declaration's* power is not binding; nevertheless, it clearly traces the limits of the indigenous population's self-determination right that the independent States do not wish to cross -*id est*, the States aim at preventing a potential implementation of the right of external self-determination for the ethnic groups.

While the global indigenous movement shape the new face of international politics, the rate of criticism rises at the same pace, resulting in tensions between the ethnic groups

and their national dominant counterpart. Carpenter and Riley<sup>182</sup> introduce the main keys on the standpoints shared by scholars and advocates regarding the growing body of skeptical commentaries on the topic<sup>183</sup>, and divide them into two lines: the first involves the critiques on the international human rights law, while the second revolves around the grade of dependence on the term “culture” when dealing with advancing indigenous rights.

To begin with, the human rights law was a reason of debate during the drafting of the UNDRIP, from the perspective of a possible “imposition” and interference with the indigenous values and due to a presumption of superiority. Consequently, the UNDRIP may “hold[...] the unwelcome power to displace tribal cultural values and disrupt tribal relationships; some of these values, for example, may be the gender-specific roles in tribal religions and a different conception of equality and inequality. Moreover, it must be remembered that a document such as the *UN Declaration* represent a set of provisions conceived and designed from the point of view of Western dominant nation-states sharing a very different mindset than the one characterizing the indigenous communities. Thus, many scholars believe that, despite all the positive provisions contained in such documents and their good intentions, “indigenous peoples still lack true recognition as political entities”<sup>184</sup>. This argument would also be supported by the hypothesis that this kind of political measure may ultimately reveal themselves as potential threatens to the very freedom of determining their own political structure, government and cultures. Another worry is also related to the human rights dimension: are they really relevant to the indigenous peoples’ cause? Under these circumstances, the UNDRIP has been seen as a mere “aspirational statement of policy with little practical import or effect”, mainly due to two factors: the *UN Declaration*’s non-binding nature and the lack of national implementation in most countries.

Secondly, a group of sceptics advanced their worry on the land rights claims in particular, seeing them as a fertile ground for a potential return of the colonialist ties. This would also lead to another severe consequence, the return of issues endemic to the

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<sup>182</sup> Carpenter, Kristen A. Riley, Angela R. “Indigenous Peoples and the Jurisgenerative Moment in Human Rights”. *California Law Review*. Volume 102, Issue 1, pg. 192. 2014

<sup>183</sup> Although not in all the documents dealing with the protection of indigenous rights, but only in the *Declaration* in question.

<sup>184</sup> *Ibidem*, pg 193.

colonial experience due to the conflicts between neighbouring indigenous groups and their own “overlapping [and] multilayered” agreements on property rights.

As regards the last years, some minor political steps have brought some changes to the still tense indigenous peoples’ condition in the Scandinavian states<sup>185</sup>. First, in 2014 Norway revised its Constitution from the point of view of the language; now, two equal Norwegian language versions of the Constitution are available (in bokmål and in nynorsk). Also, a series of human rights involving the Sami peoples’ protection was included in the “new” constitutive document through the added wording *the Sami people, as the country’s indigenous people* to Art 108. Another great achievement, according to this author’s personal opinion, is the 2015 proposal of a new National Population Register Act by the *Sámediggi*. This type of registration would not only allow to have a more precise estimate on the total Sami population, but also to keep track of the variety of Sami dialects in order, for the public authorities, to offer appropriate Sami linguistic services<sup>186</sup>. In 2015, the national mining company NUSSIR obtained the permission from the Norwegian Ministry of Environment to start underground copper mining in the area of Nussir and Ulveryggen and to deposit other necessary marine tailings in the Repparfjord. The new establishments of wind farms also represented an obstacle of no poorer value. Several reindeer herding districts have already complained, and other negative repercussions for the Sami communities and the surrounding environment seem to be expected in the future.

As for Sweden, among the most problematic issues are the fishing and hunting claims, which not only originated problems between the Sami population and the national government, but also led to internal fights among the aboriginal units. The Sami tribes reported violations of their right of fishing and hunting due to an extensive use and access to these activities committed by the rest of the population. For instance, the Sami village of Girjas presented a lawsuit against Sweden in Gällivare District Court, asking for exclusive access to fishing and hunting in their traditional area, as stated in the current Swedish legislation on the topic, the Reindeer Herding Act of 1971.

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<sup>185</sup> For said changes and improvements, I will refer to *THE INDIGENOUS WORLD 2016*, by Diana Vinding and Cæcilie Mikkelsen, April 2016.

<sup>186</sup> For this purpose, the Sámi Language Committee has been established under consultation with the *Sámediggi*.



To conclude, in 2015 the Russian government (whose information concerning their domestic indigenous groups continue to be fragmented and dramatically inadequate) accepted to include the archive of the Skolt Sámi village of Suonjel/Suenjel<sup>187</sup> in the UNESCO Memory of the World Register. This is a fundamental paper for the indigenous cause on an historical level, since it contains documents officially issued by the Russian Emperor and the Imperial Government stating endorsing the rights of the Skolt Sámi community to their fishing and reindeer herding territories. Thus, their importance lies not only in the provisions themselves, but also on the implicit factor that shows how indigenous peoples, even centuries ago, “understood documented decisions as a safeguard of their fundamental rights to their territories”.

Once concluded the above commentaries on the strengths and weaknesses of the most recent international document established for the safeguard of the global indigenous movement, the framework on the past and current condition of such sector-based rights makes way for a reflection on the future implications and political measures that have been already discussed between the international competent authorities or that are actively claimed by the ethnic minorities themselves. Consequently, Chapter 6 is designed to offer an overview on the concept of *reparation* of past wrongs and some of the advantageous provisions that could be adopted and promoted by the nation-states to benefit not only the Sami people, but also the indigenous communities on a general level.

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<sup>187</sup> Covering the period 1601-1775.

## PART III

### Chapter 5

Indigenous reparation claims for cultural loss, and arguably for all losses, do not solely arise from past wrongs. For indigenous peoples their colonial occupation and attendant dispossession continues to the present-day.<sup>188</sup>

The term ‘reparation’ (as currently used for state-to-state relations) better recalls the status of indigenous peoples as original entities over their ancestral lands that never totally lost their sovereignty.<sup>189</sup>

Part III sets itself as the last step in our analysis of the historical path that led, first, to the transformation of the concept of international law, and second, to the growth of the indigenous movement on a global scale and the recognition of their basilar rights in several national constitution. Targeting the years to come, Chapter 5 focuses on the future provisions, multilateral agreements, and socio-political measures that are scheduled to ratification, implementation or emendation in the nation-states’ agendas, moving from the general legal propositions that are already in the pipeline for the indigenous peoples’ benefit to finish with several field-based long-standing problems that still impede the smooth conduct of Sami communities’ daily life.

The core concept that could virtually enclose this chapter’s content is *reparation*. According to the pertaining international law body, this complex concept was analysed in depth by Lenzerini<sup>190</sup> in comparison with other similar terms in the attempt to give the most clear and precise definition of the term. Our specific focus is the peculiar dimension of the aspect of *substantive redress*, which, according to the author, represents one specific meaning of the word *remedies*; in turn, this term is more

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<sup>188</sup> Lenzerini, F. *Reparations for Indigenous People. International and Comparative Perspectives*. Pg. 198. Oxford University Press Inc, New York. 2008.

<sup>189</sup> *Ibidem*, pg. 11.

<sup>190</sup> *Ibidem*, see Chapter 3.

comprehensive and extended than *reparations*. The Basic Principles and Guidelines provide a definition of the victim's right to a remedy including his/her right to:

- Equal and effective access to justice;
- Adequate, effective, and prompt reparation for harm suffered;
- Access to relevant information concerning violations and reparation mechanisms.<sup>191</sup>

From what has been displayed, then, particular emphasis is attributed to the *reparatory phase*, that is “the moment in which ‘substantive redress’ is granted in favour of the peoples concerned for the wrongs suffered”. However, the process of reparation is articulated in more phases, which represent the framework of conditions needed to successfully complete such procedure:

1. The *acknowledgment*, in which the competent authorities recognise a tort towards an alleged “victim”;
2. The concrete *recognition*, in which the failed access to justice of the victim is taken into account and redirected to the right to a material procedure through which the act can be comprehensively and impartially evaluated;
3. The phase of *granting* to the victim the actual access to the legal procedure necessary to ensure an impartial evaluating process;
4. As for the fourth phase, a final *decision* is made, whose application will concern the competent authorities.

Although all these steps ensure a rightful and effective plan to acknowledge and restore the victim's rights, the process shall not be concretely actualized without “adequate<sup>192</sup> and substantive redress is *materially*<sup>193</sup> granted”. Ideally, if the redress is achieved, even if all of the above phases are omitted, the realization of justice would generally be

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<sup>191</sup> See *Basic Principles and Guidelines on the Rights to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN G.A. Res. 60/147 of 16 December 2005, para 2.

<sup>192</sup> In the sense of *full*.

<sup>193</sup> Italics added.

achieved in any case. In addition, reparation in the case of indigenous peoples presents a very interesting extra feature: in addition to the connotation related to the reparation in case of human rights' violations, at the same time the indigenous reparation must take into account the international recognition that the indigenous communities still hold a certain degree of sovereignty over their ancestral territory. Thanks to this element, the indigenous groups can receive an (partial) official amendment for the past wrongs they had to endure because of the national governments' assimilation policies from the national courts (occupation, conquest, *terra nullius*)<sup>194</sup> that were originally used to justify such appropriation of the indigenous lands<sup>195</sup>.

Lenzerini also offers several useful clarifications on the adjectives accompanying the definition of *reparation*. To assess whether a reparation measure possesses the proper characteristics to receive such denomination, some basic criteria have been established. The reparation measure, in order to be effective and adequate, must:

1. *Proportionate* to the gravity of the harm suffered, taking into account *objective* criteria.
2. The measure must be considered adequate and effective by *the persons, groups or communities to which it is addressed* acting in good faith (*subjective* criterion).

The reparation that inherently accomplishes the two criteria above the most is the so-called *restitutio in integrum* (restoration *in natura*), which is the complete restoration of the conditions existing before the tort occurred. Notwithstanding, in a great number of cases, a totally objective measure is impossible to be adopted, so that the aim is to

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<sup>194</sup> See Part I Chapter 1.

<sup>195</sup> The right to receive an appropriate reparation have been described here broadly, without distinctions between torts made towards single individuals or a community, because such reparation measures should address justice in the same proportion. Notwithstanding, it is fundamental to observe here that, as far as indigenous peoples are concerned, the collective dimension acquires a much preponderant relevance, to the extent that “[m]ost of the gross violations [of human rights] inherently affect rights of individuals and rights of collectivities... This coincidence of individual and collective aspects is particularly manifest with regard to the rights of indigenous peoples” (Lenzerini, 2009:17, see above, footnote 40). Consequently, in case of claims of violations of collective human rights, collective reparation grants shall be made as part of the indispensable prerequisites for justice. (For instance, one of the violations in question may be perpetrated to the right of the indigenous communities to “own, develop, control and use the their communal lands, territories and resources”).

restore a situation that is *as close as possible* to the pre-existing one, resulting in a partial *restitutio*; some of these measures are rehabilitation, satisfaction, disclosure of truth, guarantees of non-repetition and various measures of assistance. In the case of indigenous peoples, the *reparation* constitutes a returning or restoring “the ancestral land, sacred or culturally significant objects or essential belongings”<sup>196</sup>. It is also to be noted that this method is usually lacking in effectiveness and adequacy to redress the tort occurred, since the economic compensation, as far as the indigenous case is concerned, is of little value, as Lenzerini highlights. Thus, the solution that he suggests is to “customize” such reparation methods case-by-case, “irrespective of the fact that they are ‘typical’ or ‘atypical’ ” (in reference to the ones prescribed *de iure* by international law and administered by the international institutions in contrast with the ones that happen to be more frequently adopted *de facto*<sup>197</sup>). Another significant element adding another layer of complexity to the matter is the temporal limitation connected to international law, that during the colonisation period facilitated the dominion endeavour in detriment of the indigenous tribes. At the time, such seizure of power was in most cases considered as legal, while the same conduct has been judged, since the rise of the modern conception of international law, as wrongful and illegitimate.

After outlining the basic theoretical elements concerning the concept of *reparation* and its legal implications, some relevant information will be given on a more practical implementation of such concept through the adoption of several international documents benefitting the protection of indigenous peoples in the field of human rights violations. Two of the international documents whose content is going to be described here are the *International Labour Organization (ILO) Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (from now on ILO Convention 169) and the *United Nations Declaration on the Rights of Indigenous Peoples* (from

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<sup>196</sup> Lenzerini, F. *Reparations for Indigenous People. International and Comparative Perspectives*. Pg. 14-15. Oxford University Press Inc, New York. 2008.

<sup>197</sup> As James Anaya stated, “[i]t is one thing...for international law to incorporate norms concerning Indigenous peoples; it is quite another thing for the norms to take effect in the actual lives of people”. See Anaya, S. James. *Indigenous Peoples in International Law*. 2<sup>nd</sup> edn, pg. 185. Oxford University Press, New York, 2004. In Lenzerini, F. *Reparations for Indigenous People. International and Comparative Perspectives*. Pg. 164. Oxford University Press Inc, New York. 2008.

now on the Declaration). Despite the extensive analysis on these two documents offered in Part II Chapter 4, part of the most significant articles were voluntarily included in Chapter 5 due to their underlying themes –indigenous peoples’ right to reparation and the objective and subjective conditions to obtain it.

The first of these documents, whose content is exclusively devoted to the indigenous peoples, is the ILO Convention 169. Being the only treaty focused on these sub-category of rights, the ILO Convention 169 is “the most binding of such international instruments”<sup>198</sup>, thus, arguably, the most powerful and influential. As already said in Chapter 4, this Convention, coming in substitution on the former ILO Convention 107, contains provisions touching a wide range of fields, but their implementation results entirely up to the national governments’ measures. As a matter of fact, it does not explicitly demand strict compliance with its rights but rather, as in Art 21(1), governments have “the responsibility for developing...coordinated and systematic action to protect the rights of [indigenous and tribal] peoples and to guarantee respect for their integrity”. In addition, Art 34 declares that the “nature and scope of the measures to be taken to give effect to this Convention shall be determined in a *flexible manner*”<sup>199</sup>, having regard to the conditions characteristics of each country”. However, the Convention specifically demands, at Art 2, measures to ensure equality, promote social, economic and cultural rights and to eliminate social-economic gaps, adding that Arts 5, 6 and 8 provides for obligations on states for consultation with the indigenous competent authorities about the implementation of the content of ILO Convention 169, in order to “recognise, protect and respect indigenous cultural, social religious and spiritual values and institutions, as well as their customary laws” (Lenzerini, 2004:167).

In special relation to the issue of redressing of lands and natural resources, Art 15 officially declares the indigenous peoples’ right to such resources, although with a peculiar clause: in the case of state ownership of the mineral or underground resources of any kind, the states concerned must “establish or maintain procedures through which they shall consult” the indigenous communities residing on the territory, in order to

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<sup>198</sup> Charters, Claire. *Reparations for Indigenous Peoples: Global International Instruments and Institutions*. In Lenzerini, F. *Reparations for Indigenous People. International and Comparative Perspectives*. Pg. 166. Oxford University Press Inc, New York. 2008.

<sup>199</sup> Italics added.

assure, if it is the case, to which degree said autochthonous groups would be affected by the programmes of exploration and or exploitation planned by the states before they are actualized. Also, a fair amount of benefits and, in case, compensation, shall be distributed among the peoples concerned.

Arguably, Art 16 is the most detailed reparations provision in any of the national instruments related to indigenous rights. According to provisions 1 and 2, it is prohibited to remove from their traditional land and reallocate the indigenous and tribal communities unless “it is considered necessary as an exceptional measure” and under permission of the indigenous and tribal groups themselves. In case consent cannot be obtained, other provisions still allows a relocation process but also provides for a full and effective representation of the indigenous groups in order to ensure a fair procedure. However, this shall not be a permanent solution in any case; Art(3) states that “[w]henever possible, these peoples have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist”<sup>200</sup>. In case returning to the homeland is not possible, the indigenous groups must, “in all possible cases”, be provided with “lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development”<sup>201</sup>. As we see here, the restoration of the pre-existing condition is not fully possible, since the land possesses a precious unique value for each indigenous group. Notwithstanding, thanks to this provision, the indigenous communities would still be granted the access to a territory, thus to its resources and to a financial stability.

As regards the *United Nations Declaration on the Rights of Indigenous Peoples*, specific articles regulating reparation measures are included in several of its articles. The Declaration was adopted by the UN General Assembly in 2007 and it represents the most revolutionary and progressive of international instruments benefitting the indigenous fringe of the population to the present day<sup>202</sup>. Notwithstanding, the Declaration’s nature is not binding, but rather it suggests and promotes the compliance of its provisions on the states. To achieve the terms set by the Declaration, states are

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<sup>200</sup> The greatest problem, here, remains who shall be entitled to determine such a condition.

<sup>201</sup> The victims concerned can also opt for a compensation and its appropriate guarantees instead of a replacement, if they express their preference for the former.

<sup>202</sup> Further information on the Declaration can be found in Part II Chapter 4.

entitled to take appropriate legislative and non-legislative measures. The key point is Art 40, in which indigenous peoples “have the right to...effective remedies for all infringements of their individual and collective rights” –which, as Charters highlights, is such a broad provision to embrace all of the others belonging to the Declaration.

Contrary to the ILO Convention 169, the Declaration does not provide any particular guideline on the methods of reparations of the states as a result of the violation of a people’s right to self-determination, hence the uncertainty lingering in situations of this kind. Despite this lack of instructions, a fixed concept is included in Art 4, stating –in Charters’s words- “the right to self-determination in the Declaration does not necessarily require states to recognize a unilateral right for all indigenous peoples to secede”<sup>203</sup>. This articles led to controversial debates among scholars and legal experts, because the interpretation of the provision above would suggest that indigenous peoples, according to the Declaration, cannot claim any reparation on the states through their right to external self-determination, unless valid compelling reasons subsist (e.g. they are under colonial domination). Thus, it would still be offered a remedial solution even without certainty in the context of the right and its appropriate remedy.

Details on the specific states’ obligations to offer reparation in case of breach of indigenous peoples’ cultural rights are, along with Art 40, also contemplated in Art 7, 10, 12, 13, 27 and 28. Among them, in Art 7, the circumstances in which the right to redress is contemplated are listed thoroughly<sup>204</sup>:

States shall provide *effective mechanisms*<sup>205</sup> for prevention of, and redress for

- a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
- d) Any form of forced assimilation or integration;

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<sup>203</sup> Charters, Claire. *Reparations for Indigenous Peoples: Global International Instruments and Institutions*. In Lenzerini, F. *Reparations for Indigenous People. International and Comparative Perspectives*. Pg. 169. Oxford University Press Inc, New York. 2008.

<sup>204</sup> Even though no form of reparation is specified in the Declaration.

<sup>205</sup> Italics added. See footnote above.



- e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Similarly, Arts 12 and 13 envisage respectively redress in relation to the unauthorized appropriation of indigenous peoples' cultural, intellectual, religious and spiritual property and the more concrete repatriation of ceremonial objects. In these cases, as can be imagined, restitution is one of the most applied methods of redress.

In opposition with the redress for violations of the rights administered in Art 7, Art 10 contains the forms in which the redress should be given for violations of the Declaration's land rights; it clearly states that indigenous peoples "shall not be forcibly removed from their lands or territories", stressing once again the importance of the prior and informed consent of the indigenous peoples before a potential relocation. In other cases, they also have right to a just and fair compensation or an option of return to the traditional land, if possible, as seen for the provisions on redress characterizing the ILO Convention 169.

Rights concerning the traditional land are also set out in Art 28, which takes into account the "ancestral" element of the indigenous land and the unfair treatment that they received in seeing their traditional ownership subtracted; Art 28 thus advocates restitution as the most suitable form of redress. In case restitution is not possible, a "just, fair and equitable compensation" must be ensured to the harmed community. Such compensation is also well defined in the last provision of Art 28 and consists of lands, territories and resources presenting the same features in terms of size, quality and legal status of their previous land, or, as an alternative, of monetary compensation or other form of redress agreed upon by the peoples affected.

However, the UN Declaration on the Rights of Indigenous Peoples and the ILO Convention 169 shows a considerable difference in regards to the reparation measures connected to the indigenous land. The key difference lies in the temporal dimension: the Declaration is also comprehensive of the right on a land that was traditionally owned, occupied and used in the past, not only to lands that have been continuously held by the indigenous peoples. This is a fundamental factor due to the configuration of Art 28 as a

broader corridor of operation allowing those indigenous communities that have lost their land in the past to claim it again nowadays. However, Charters once again draws attention on the fact that the Declaration only allows compensation in undefined forms of suitable redress, while the ILO Convention 169 provides for compensation only in case restitution is not possible “when indigenous peoples express a preference for it”, setting the active presence of the indigenous peoples’ will as a foremost element in the process of redress.

Likewise, other international human rights treaties contain guidelines for the cases of violations of indigenous rights, but to a minor extent; they indeed do not prescribe any explicit state obligations nor appropriate reparation strategies towards the community or the single individuals. In particular, human rights related to culture are among the most sought in order to ground orders for reparations. The documents most frequently involved are the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention on the Rights of the Child* (CRC), and the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD Convention), which respectively deal with the protection of the cultural, religious and linguistic rights, the protection of the same rights but to the specific benefit of the indigenous children, and the protection from discriminatory treatment along with the promotion of equality between the indigenous and non-indigenous fringes of the population. In the same way, the state obligations to provide the suitable reparations and remedies also depends on the international treaties and their specific provisions.

However, this overview on the possible paths that the states may follow according to international law in order to provide reparations for human rights violations would not be complete without an equal overview on the obstacles that still persist on the actualization of such methods. Arguably, the most common and lingering barrier is the non-retroactive nature of these international provisions. This is also true for those indigenous communities that suffered abuse of power and violations of their rights in the past, but nowadays still hold a small portion of their traditional territory of the past: proving the past wrongs they had to endure is a complicate task that requires historical records, not always kept to date, and a deep analysis of the dynamic situation characterizing a specific moment and place and the two or more counterparts. On the

same historical line, the question may be raised whether the states concerned necessarily have to compensate or take redressing measures towards the indigenous community for an event that happened in the past and, most of all, with different participants. On a political level advocating the very “patriotic spirit” of a nation, we may add that such a late admission of fault might provoke a break in that “carefully cultivated myth of the founding fathers of a nation”<sup>206</sup>, thus overturning the roles of the dominant nation-states and the exploited indigenous minority.

Francioni<sup>207</sup> continues his arguments on the topic by offering some counterarguments on the barriers to reparation see above. First, he claims that the retroactivity objection does not subsist, since today’s standard does not hold because the wrongs of the past resulted in being already illegal at the time they were committed. Furthermore, the retroactivity power could not be applied by moral duty to violations of the most fundamental inalienable human rights and humanitarian laws such as genocide, mass deportation, and deprivation of means of livelihood<sup>208</sup>. In a certain way, for what the land ownership is concerned, even in the case indigenous peoples had lost theirs on a certain portion of territory, they still own it to a certain extent, or better, they still have right on it thanks to the “ancestral element” that we have analysed in the previous chapters. As for the second objection, preventing the current generation to take proper - even if late- action towards past wrongs is without any doubt less cruel and unfair than turning “a blind eye to the unjust enrichment of states, communities, companies and individual made, directly or indirectly, as a consequence of the abuses or the spoliation of indigenous peoples”<sup>209</sup>. In this severe case, a fair compensation (*en lieu* of restitution, where possible) should be sought, on behalf of the moral duty we all share towards addressing human rights (other compensation methods should include official recognition of past wrongs, formal apology and guarantees of non-repetition).

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<sup>206</sup> Francioni, Francesco. *Is International Law Ready to Ensure Redress for Historical Injustice?*, in Lenzerini, F. *Reparations for Indigenous People. International and Comparative Perspectives*. Pg. 44. Oxford University Press Inc, New York. 2008.

<sup>207</sup> *Ibidem*.

<sup>208</sup> To which the list continues with the so-called *gross violations*: slavery and slavery-like practises; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; and systematic discrimination.

<sup>209</sup> *Ibidem*, pg. 43.

Francioni distinguishes the two cases above from the one regarding political objections to reparation. Due to its much more complex and subjective nature, the claims of redress advanced by indigenous peoples may be then taken as an example by other ethnic groups that suffered similar conditions, leading to a wave of claims that, although legitimate, could be hardly contained and controlled. On a side note, these movements of claims brought by the minorities may also reveal their destabilizing, harming and counter-productive power towards society as a whole, for example at a time of constitutional instability.

The methods of reparation and their actualization in the states' constitutions through the international instruments' provisions are not the only option for indigenous peoples in matters of human rights claims. Some of the fields in which the indigenous communities can find concrete help in protecting their cultural, social and health entitlements and some of the human rights implementation services they offer will be listed and commented below, along with some of the potential future improvement suggestions that are planned for the next years.

On a social perspective, one of the fundamental elements that grants protection and transmission –thus keeping a culture alive- of the rights of indigenous peoples is education, at all levels. For this reason, the educational methods and approaches offered by the national program should be carefully examined and improved, if necessary. Unfortunately, the education in Sami languages and cultures is not considered to a fair extent. Several authoritative researchers and scholars spent a few words on the topic by devoting some pages on the situation and the measures that may potentially lead to an improvement of the indigenous peoples' conditions on a general level. Timo Koivurova draws the attention on the provisions contained in the *Nordic Sami Convention* that deal with these topics, the last article of Chapter III, Article 33, entitled “The Cultural Basis”<sup>210</sup>. To use Koivurova's words, “the fact that the Saami culture and its material basis are closely interlinked” is the core subject in Article 33 of the Convention. Due to the nature of the Sami peoples' lifestyle, their cultural heritage corresponds to the livelihood practices that this people have been run through the centuries for their

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<sup>210</sup> Koivurova, Timo. *The Draft for a Nordic Saami Convention*. Pg. 121.

subsistence. Consequently, a first point that is important to notice is that due to the state's obligation to facilitate and benefit the economic independence of the indigenous groups, they should also at the same time aim at promoting but also maintaining the cultural dimension of the minority group. The first cultural asset exclusively belonging to the indigenous peoples, which is a precious elements and a means of transmission at the same time, is language. The *Nordic Sami Convention* imposes some duties on the Nordic states on this regard and granting their implementation. For instance, Art 23 of the Convention administers the right to “use, develop and pass on to future generations its language and its traditions and have the right to decide and retain their personal names and geographical names, as well as to have these publicly acknowledged”. By doing so, the presence of the indigenous traditional minority and its relevance on the national scene would be self-evidence and would be a chance for such minority to assert their participation in and contribution to the national social and historical heritage. The circulation of the Sami language would also have two more advantages in the short term: first, the Sami language could be effectively used in courts of law and in other legal environments, as well as with the competent authorities of the area<sup>211</sup>; second, the Sami language could result helpful in a medical background (i.g. hospitals and ER), so that the health and social services could be more efficient and develop better performances.

One of the environments where the linguistic dimension consistently influences societies both on a short and on a long term is school. Art 26 of the Convention provides guidelines that directly apply to the national and Sami educational system, establishing two set of values as regards the Sami language: youths and children residing in the Sami territory are entitled to receive an education in and on the language in question, adding details on how this project should be accomplished in respect of finances, the Sami way of life, etc. In order to efficiently apply the guidelines above, the educational program must be agreed upon after appropriate and thorough consultation with the Sami Parliaments and “be adapted to the cultural backgrounds and needs of Saami children and adolescents”<sup>212</sup>. In addition, this case offers another change to -as commented above- convey the social importance on a domestic and international level

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<sup>211</sup> See Art 27 of the Convention.

<sup>212</sup> See Art 26(3), *ibidem*.

of spreading the knowledge on the Sami culture and society, this time achieved through the job opportunities to work in the Sami area for the non-Sami citizens<sup>213</sup>. Provisions equally advocate for the importance on the states of setting research programs and centres in the Sami area taking into account the Sami needs, as well as incrementing the recruitment of Sami researchers.

When we mentioned the idea of spreading the Sami culture's knowledge to the other "mainstream"<sup>214</sup> non-Sami part of the population, the use of mass media could have possibly come to mind. The Convention devoted Art 25 to the major benefits that such means of communication can generate in favour of the hidden sectors of society. As an example, "the states are required to create conditions for an independent Saami media policy", specifying that this measure's final aim is to enable the Sami population to acquire and manage its own media channel in an independent way. An obligation also exists on the states based on promoting the cooperation across the national borders between media institutions offering articles and easily accessible information in the Sami language<sup>215216</sup>. In order to help facilitate the future livelihood perspectives on the Sami youth, "the proper functioning of the day-care, educational and media systems" are absolute requisites to seek in the shortest possible time –since processes of this kind need a long time before showing any trace of improvement.

Returning to arguably the very core of the concept of indigenous peoples' wisdom and skills, their primordial knowledge of Mother Earth and its never-ending resources, Art 31 also states that:

[The states] shall respect the right of the Saami people to manage its traditional knowledge<sup>217</sup> and its traditional cultural expression while striving to ensure that the Saami are able to preserve, develop and pass these on to future generations<sup>218</sup>.

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<sup>213</sup> See Art 28, *ibidem*.

<sup>214</sup> See Koivurova above, pg. 212.

<sup>215</sup> This is another goal to be set after consultations with the Sami Parliaments.

<sup>216</sup> See Art 25, *ibidem*

<sup>217</sup> Defined as "the skills and knowledge of flora, fauna and other natural resources and the ways to manage these". In addition, cultural expressions include, among the other, *joik* singing, traditional costumes, Saami handiwork (*duodji*), Sami dialects and Saami traditional stories, legends and myths.

<sup>218</sup> Koivurova, Timo. *The Draft for a Nordic Saami Convention*. Pg. 122.

As Koivurova explains, as commercial media and companies have been appropriating of the Sami traditional cultural symbols to use for profit-making purposes based on legislation on immaterial property rights, stronger measures had to be taken in order to protect the Sami unique identity. The *Nordic Sami Convention*, as a fundamental and pioneering international document, took a stance on the matter by including some protective provisions in its text. According to such provisions, the Nordic states need to ensure the Sami people the ownership on their own cultural legacy and concurrently grant a fair portion of the profits coming from the employment of any part of such traditional cultural legacy by any company making use of it<sup>219</sup>.

However, a crucial side concept emerges after these reflections. The chapter on “Saami Language and Culture” is, as Koivurova stresses, mostly based on the idea that the Sami language needs to be preserved within the traditional Sami territory’s borders, and not outside. Notwithstanding, it would be of much more use to plan a two-step program to upgrade and strengthen the Sami social and political presence as a whole: the first step would consist of reinforcing the social potential of the Sami culture and language by empowering all the levels of education by giving them the appropriate instruments to keep and transmit their knowledge; the second step would then be feasible only once the first step were sufficiently fulfilled, and it consists of the gradual yet powerful spread on a wide scale of the “Sami issue” in order to provide the means to a conscious awareness on the rest of the non-Sami population about the ethnic minority residing in their country.

Phillipson and Skutnabb-Kangas also devoted some pages on the social importance of languages, drawing a comparison between the past and present days to better understand how the role of languages changed according to the population needs. In their essay *Linguistic Rights and Wrongs*<sup>220</sup>, they explain how language policies are not an exclusive matter of the minority fringes of the population, but it rather affects each and every community on a manifold level. However, generally speaking, as the authors singled out, “human rights in general exist for the weak, the vulnerable, the dispossessed, the inarticulate...minorities are the natural “consumers” of human

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<sup>219</sup> For more detailed provisions on the Sami cultural heritage, see Art 32 of the Convention.

<sup>220</sup> Phillipson, Robert. Skutnabb-Kangas, Tove. *Linguistic Rights and Wrongs*. Oxford University Press. Roskilde University, Denmark. 2004

rights”<sup>221</sup> –hence the misleading idea that language rights, even though included in the basilar human rights list, only concern the minorities, the autochthonous communities and the immigrants. Probably for the same reason, hierarchies exist in between the languages within the same state: the language spoken by the dominant fringe of the population imposes itself on the language of the minority, which more and more is banished to the domestic and private spheres, resulting in its loss of public visibility and power<sup>222</sup>. Notwithstanding, linguistic movements have been raising their voice in the last decades thanks to the new international resonance that human rights have obtained, a new emergence has emerged in the spotlight: more and more states have been paying attention to the potential high risk of seeing their national languages, especially the autochthonous ones, jeopardized by the changes in modern society.

With the birth of new LHRs<sup>223</sup>, new reflections were naturally raised. According to the individual and collective nature of these rights, the individual have the right to “identify positively with their mother tongue(s), and have that identification respected by others, irrespective of whether their mother tongue is a minority language or a majority language”<sup>224</sup>. In reference to Koivurova’s opinions, these rights strongly affirm the right of *all* individuals, not only the ones belonging to some ethnic minority, to learn their mother tongue and to use it in official contexts. As a natural consequence, the authors single out, it would therefore be normal that teachers or minority children were bilingual; measures to implement this condition and furnish the best multilingual education to teachers would then be absolutely necessary in order not to infringe or restrict the fundamental linguistic rights of the population. On a final note, in relation to the paragraph about language rights in Part I Chapter 1, frictions occur not only when the minority language is not promoted or, even to the maximum extent, forbidden by law, but also when the majority of the population is reluctant in “giving” the dominant language to the minority groups, thus excluding the latter from their benefits and rights

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<sup>221</sup> Thornberry, P. *International Law and the Rights of Minorities*. Oxford: Clarendon Press. In Phillipson, Robert. Skutnabb-Kangas, Tove. *Linguistic Rights and Wrongs*. Oxford University Press. Roskilde University, Denmark. 2004

<sup>222</sup> This phenomenon had a particular impact on the work industry, where –in Phillipson and Skutnabb-Kangas’s words- “a diglossic division of labour” took place, shaping the new face of society on an European and global level.

<sup>223</sup> Linguistic human rights.

<sup>224</sup> Phillipson, Robert. Skutnabb-Kangas, Tove. *Linguistic Rights and Wrongs*. Pg 488. Oxford University Press. Roskilde University, Denmark. 2004



in a stronger manner. Unfortunately, it seems that the implementation of LHRs, especially on the indigenous populations, is still at stake, despite the increasing claims and requests invoked by the minority groups of many states. However, constructive efforts are under way on many levels to enhance them, and it is worth to mention their commitment to the cause in the education systems and in international fora simultaneously.

Ironically, one of the issue that still prevent to take clear and definite standpoints on the matter is the notion of indigenous people itself. As long as an agreement is not reached on who can benefit from the privileges of such denomination, it seems impossible to *concretely* implement them. These are political difficulties that should not be underestimated, as Phillipson and Skutnabb-Kangas stress. In their favour, it must be said that implementation must be sensitive to the local context and cultural norms, meaning that there could be “tension between these and normative human rights”, despite the national governments’ efforts to provide such essential service and to bridge the gap in the human rights fields between the majority and the minority fringes of populations within their national borders.

One initiative that is worth remarking, although it came to an end, is the scientific research programme *International Polar Year*, which was developed between 2007 and 2009 and whose main target was reinforcing the interest and the concrete action on the Polar Law issue. Along the line of this research project, courses on the matter were offered at the Icelandic University of Akureyri, and many seminars and conferences are held at universities and research centres located in Scandinavia, North America and Northern Russia (to a small extent)<sup>225</sup>.

Another issue that has been facing bitter controversies in the latest decades –and it seems to degrade instead of finding concrete solutions- is the concern for the indigenous peoples’ health conditions. This topic in particular have already been analysed in Part I Chapter 2, therefore only suggestions of solutions and projects will be touched in this

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<sup>225</sup> Mazza, Mauro. “Percorsi di ricerca sul diritto polare”, *Quaderni*, Facoltà di Giurisprudenza, Università degli Studi di Bergamo, pg 23. Dipartimento di Scienze Politiche “Alberico da Rosciate”, Jovene Editore, Napoli. 2011

section. Likewise, being this topic rather extended and subject to precise local populations, the descriptions and comments will be skimmed to only focus on the Sami people's case –a choice made for the paragraph on Health in Part I Chapter 1 as well.

Not many information have been collected so far on the general health situation of the Sami people in particular, despite the increasing interest showed in the last decades. During the Second World War, this population in particular attracted the attention of researchers due to the spread opinion that studying the Sami people's anatomic features could lead to revolutionary discoveries in the medical world. In particular, on account of the studies of eugenics conducted during this period, a great quantity of skulls of indigenous peoples –Sami included- were sent to research centres to be analysed and compared, in search of consistent proofs that indigenous peoples somehow share different typologies of genes.

On a general level, the health and living conditions of the Sami people can be considered exceptionally good if compared with the conditions of the other indigenous peoples in the circumpolar region. The reasons why the available information on the health conditions on the Swedish Sami population is limited –the same applies for the Sami communities residing in the other Scandinavian countries- are various. The most important opinion according to Per Sjölander is that the needs and possibilities of the ethnic minorities are neglected in Sweden, due to the efforts towards equality that the governmental policies pursue. Thus, little room is left for specific actions aiming at improving the ethnic communities right condition. As a result, as the Swedish author underlines, health policies on a national level are lacking, showing that no funds and human resources were employed in the research on health-related domains. Devoting a portion of the national funds on this kind of activity would therefore be a first relevant step towards the knowledge necessary to improve the Sami rights implementation.

On the other hand, several factors have been singled out in influencing the health status of the Sami people residing in Sweden, as Sjölander<sup>226</sup> outlined. In particular, specific diseases have been found among the reindeer-herding Sami. Most of these problems<sup>227</sup>

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<sup>226</sup> Sjölander, Per. "What is known about the health and living conditions of the indigenous people of northern Scandinavia, the Sami?" *Cluster: Vulnerable Populations in the Arctic*. Southern Lapland Research Department, Vilhelmina, Sweden. 2011

<sup>227</sup> See Part I Chapter 2, section *Health conditions*.

are rooted in social behaviours, notably marginalization and poor knowledge in the majority population of the Sami culture –and, in this case, of the reindeer herding activity. As can be imagined, the solution suggested by Sjölander would therefore be the general improvement of the health status of the Sami people practising reindeer herding. In order to enhance it, the legal rights of the Sami people should be strengthened from the point of view of their entitlement on the use of their traditional land for reindeer herding, including other economic and cultural practices contributing to their sustenance. This is a complex and challenging project, Sjölander states, due to the major involvement of the governmental political programmes and policies, which should undergo extensive changes in their law regulations<sup>228</sup>. However, before starting this long and gradual process, concrete faster action can be called for in the occupational field. To be more precise, the author proposes a way of establishment of occupational health-care centres, which are supposed to become an integrated part of reindeer husbandry<sup>229</sup>. Thanks to the creation of such public social structures,

Their [Sami people] health condition would also benefit from a system of appointed health coordinators with specific assignment to facilitate the relationship between the reindeer-herding Sami and existing occupational health-care services and various health-care institutions and clinics<sup>230</sup>.

Sjölander spends some more words on another essential figure of these health-care centres, the coordinator.

[...] The coordinator's main responsibility should be to guide the reindeer-herding men and women within the health-care system and to inform and educate the health-care professionals about the reindeer-herding lifestyle, the working conditions, and the Sami culture.

Related to the health issues described above, the rights to food sovereignty and development also represent a fundamental base for the indigenous populations'

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<sup>228</sup> Sjölander, Per. "What is known about the health and living conditions of the indigenous people of northern Scandinavia, the Sami?" *Cluster: Vulnerable Populations in the Arctic*. pg 9. Southern Lapland Research Department, Vilhelmina, Sweden. 2011

<sup>229</sup> *Ibidem*, pg 9.

<sup>230</sup> Sjölander, P. Edin-Liljegren, A. Daerga, L. Samernas hälsosituation i Sverige - en kunskapsöversikt. Kiruna (Sweden): The Swedish Sami Parliament. SáOU 2009; 1-99. In Sjölander, Per. "What is known about the health and living conditions of the indigenous people of northern Scandinavia, the Sami?" *Cluster: Vulnerable Populations in the Arctic*. pg 9. Southern Lapland Research Department, Vilhelmina, Sweden. 2011

livelihood. Priscilla Claeys investigated the current situation in this regard in the FIAN<sup>231</sup> International Briefing of December 2015, giving accounts of the status of the rights to development, to food sovereignty, to dispose of natural resources<sup>232</sup>. The purpose of this briefing was a *Declaration of the Rights of Peasants*, whose agreement was reached by the ratifying states in May 2017<sup>233</sup>. Even though the name of the Declaration, as well as the content, mostly mentions the peasants, indigenous peoples also enjoy the protection of several of their rights thanks to this international document. The Introduction<sup>234</sup> states:

Almost half of the people in the world are peasants. Even in the high-tech world, people eat food produced by peasants. Small-scale agriculture is not just an economic activity; it means life for many. The security of the population depends on the well-being of peasants and sustainable agriculture. To protect human life it is important to respect, protect and fulfil the rights of the peasants. In reality, the ongoing violations of peasants' rights threaten human life.

One of the points that shall interest us the most here is the second article, *Violations of Peasants' Rights*. In this article, some of the violations mentioned directly recall the indigenous case:

- Millions of peasants have been forced to leave their farmland because of land grabs facilitated by national policies and/or the military. Land is taken away from peasants for the development of large industrial or infrastructure projects, extracting industries like mining, tourist resorts, special economic zones, supermarkets and plantations for cash crops. As a result, land is increasingly concentrated in a few hands.
- Monocultures for the production of agrofuels and other industrial uses are promoted in favour of agribusiness and transnational capital; this has devastating impacts on forests, water, the environment and the economic and social life of peasants.

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<sup>231</sup> Food First Information and Action Network.

<sup>232</sup> Claeys, Priscilla. FIAN INTERNATIONAL BRIEFING. *Rights to sovereignty over natural resources, development and food sovereignty*. In the United Nations Declaration on the rights of peasants and other people working in rural areas. December 2015.

<sup>233</sup> Full text of the *Declaration of the Rights of Peasants* available at <https://viacampesina.net/downloads/PDF/EN-3.pdf> (*La Via Campesina* Organisation Website).

<sup>234</sup> See Art 1 of the Declaration.

- As they lose their land, communities also lose their forms of self-government, sovereignty and cultural identity.
- Women's and children's rights are the most affected. Women are victims of physiological, physical and economic violence. They are discriminated in their access to land and productive resources, and marginalized in decision making.
- Access to health services and to education is decreasing in rural areas and peasants' political role in society is undermined.
- The crisis in the agricultural sector cause migration and the massive displacement and disappearance of peasants and indigenous people.

The violations listed above show only some of the disastrous consequences that indigenous communities have to deal with on a daily basis. Their right to land sovereignty is strongly threatened by the environmental changes caused by pollution and the massive excessive exploitation of the natural resources in the soil; the aggressive policies of massive displacement or labour slavery; the lack of the appropriate health and educational services; the discriminative behaviours, especially towards women and children. Although the problems showed represent formidable hindrances in the indigenous rights' implementation, Claeys furnishes several measures to settle and support the recognition of the rights of indigenous peoples (with a particular focus on the rights to land sovereignty and usage of the underground natural resources). For instance, the right to development was recognised in the 1986 *Declaration on the Right to Development* as both individual and collective right and should be granted through measures whose premise is the equality of opportunity to all the people to basic resources, education, health services, food, housing, employment and the fair distribution of income. A special point would also be the assignment of an active role in the developing process to women. These measures, if correctly applied, would therefore allow the indigenous peoples to access more public and private services; to receive a better education while protecting and promoting their cultural heritage; to receive a fair treatment in the workplace, eliminating discrimination and creating a more comfortable space where to grow and acquire new skills; last, to receive a proper income proportioned on one's efforts and preparation, according to the fair

application of the workplace policies. It is fundamental to notice here that “States hold ‘the primary responsibility for the creation of national and international conditions’ favourable to the realization of this right”<sup>235</sup> and have to formulate “appropriate national development policies”<sup>236</sup> while encouraging “popular participation in all spheres”<sup>237</sup>. The international dimension must not be forgotten as well, since states have to cooperate and set together the suitable conditions for the implementation of the right to development. The rapidly growing urbanisation and development due to industrialization also bring worries for the future of the indigenous peoples’ conditions, but Art 5(3) protects the interests of the people working in rural areas by asserting their right to “determine and develop their own priorities and strategies for exercising their right to development”.

In addition, articles supporting the rural indigenous communities’ right to dispose of natural resources are included in the Declaration. Although the tension between the states’ and the indigenous peoples’ right to ownership on the land is still a controversial issue, the negative consequence of such conflict have been detrimental only to the latter. Especially, the failed access to the land and to the natural resources it contains have contributed to their food insecurity and vulnerability –in some cases, with deadly results. However, the international human rights law clearly administers that

[...] [T]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised “in the interest of their national development and of the well-being of the people of the State concerned” 9. In other words, there is a limitation to state’s sovereignty because states have to ensure that natural resources are used and exploited in a way that is beneficial to the people.

The reality is that these provisions limiting the nations’ power of ownership are still difficult to achieve *de facto*, but in this regard, the *Declaration of the Rights of Peasants* provides for the lack of implementation by integrating recent developments in international regulations: the right to food can be successfully implemented only when the access to the land and its natural resources is granted. It is no coincidence that Art 5(1) of the Declaration states that “peasants and other people working in rural areas

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<sup>235</sup> Art 3.

<sup>236</sup> Art 4.

<sup>237</sup> Art 8.

‘have the authority to manage and control their natural resources and to enjoy the benefits of their development and conservation’ “.

Last, the right to food sovereignty can be considered as a “broad multidimensional concept”<sup>238</sup> which encloses three different rights: the right to self-determination, the right to development and the right to access and disposition of the land’s natural resources. In connection with the right to food sovereignty, the Declaration explores the importance of *relocalizing* our food system, in order to “rebuild short food chains and regenerate autonomous and resilient local food systems”. This kind of measure not only takes time and effort on the ratifying states, but it also requires

[...] the participatory elaboration of public policies to advance food sovereignty at the local, national, regional, and international levels, as well as mechanisms for ensuring coherence with the other agricultural, economic, social, cultural and development policies<sup>239</sup>.

On a local level, the author also stresses the need of

[...] relocalizing food systems... [choosing] alternative international trade rules and revitalized local and regional food systems and markets.

In combination with the measures mentioned above, the author also adds two aspects related to food sovereignty that would benefit the rural communities and the indigenous groups, as well as, ultimately, the entire population:

1. The fundamental role of “transitioning the modes of producing, distributing and consuming food that are sustainable and resilient in the face of climate change, such as agroecology”<sup>240</sup>. Involving the environmental issues, the Declaration suggests a transition to circular systems that are able to mimic the natural ecosystems, so that farmers’ supplies were sufficiently independent in their own agricultural process, without the need to seek external inputs.

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<sup>238</sup> Claeys, Priscilla. FIAN INTERNATIONAL BRIEFING. *Rights to sovereignty over natural resources, development and food sovereignty*. In the United Nations Declaration on the rights of peasants and other people working in rural areas. Paragraph 3. December 2015.

<sup>239</sup> Art 5(5) of the Declaration.

<sup>240</sup> Art 21(3) of the Declaration.

2. The adoption of alternatives, but this time about the “ways of governing our food system”. What is advocated for here is the need to increase the citizen participation to the decisional process by reinforcing the role of peasants and other rural organizations in the matter<sup>241</sup>.

All of these provisions regulated by the *Declaration of the Rights of Peasants* have one fundamental revolutionary concept at their base: restoring the role of peasants and rural workers –thus indigenous peoples as well- in the decision-making process when it comes to environment sustainability, food production and local land management. This element has already been sufficiently highlighted throughout this dissertation when mentioning the precious unique link connecting the indigenous peoples to their mother land and, by extension, Mother Earth. Indigenous peoples share the strongest and purest link with the place they live in, and national governments should not only grant their rights to land ownership and management as a basic human right concession, but they should also allow them to access the decision-making process in this regards and share their suggestions to ensure “coherence with the other agricultural, economic, social, cultural and development policies”<sup>242</sup> on national level, as well as “socially just and ecologically sensitive methods”<sup>243</sup> of food production.

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<sup>241</sup> Art 5(2) of the Declaration.

<sup>242</sup> Art 5(5).

<sup>243</sup> Art 5(4).





## Chapter 6

### Final Remarks

The honourable way forward is to respect, not denigrate, cultural differences<sup>244</sup>.

The main purpose of this dissertation is not of making personal remarks on the implementation measures of the indigenous peoples' rights around the world. Rather, its clear intention is to give an objective overview on the topic of ethnic minorities and indigenous groups, with a special focus on the Nordic tribe of the Sami people; providing the correct terminology; offering a broad yet selected historical critique on the global events that, centuries ago, brought to the birth and evolution of international law and the development of those specific human rights affecting the indigenous populations' situation; commenting on the latest legal achievements that have witnessed the increased interest in the indigenous issue and the concrete efforts on some states and organisations in improving their situation; describing the future measures that are highly desirable and beneficial towards the indigenous peoples.

Although the present work is not based on a subjective standpoint (years would be necessary to examine all the material available on this ever-changing topic and to form an unbiased opinion), the author cannot but naturally and spontaneously form his or her own ideas on the topic. The present author tried to be as neutral as possible, even though, as seen, this kind of controversial issue never stops stirring people's heart and giving space to heated debates. This dissertation has not been written in order to bring new controversies to the already manifold arguments on the current international scene; yet, I still believe that some points of view should be adopted on a global scale, since they are based on shared indisputable proves.

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<sup>244</sup> Asch, M. *Conclusive Thoughts and Fundamental Questions*, in Bell, C. Paterson, R.K.. (edited by), *Protection of First Nations Cultural Heritage. Law, Policy, and Reform*, 1, Vancouver, University of British Columbia (UBC) Press, 2009, espec. p. 408 in Mazza, Mauro. "Percorsi di ricerca sul diritto polare", *Quaderni*, pg 185. Facoltà di Giurisprudenza, Università degli Studi di Bergamo. Dipartimento di Scienze Politiche "Alberico da Rosciate", Jovene Editore, Napoli. 2011

The value that represents a sort of *fil rouge* recurring in this dissertation and connecting all the chapters is the concept of *indigenusness*. This concept would silently infiltrate in all the written and digital academic sources I have been digging to have a clearer overview on the topic. The more I encountered this notion being interconnected with every historical event and provision contained in international treaties, the more I was convinced that it was a central element in the indigenous discourse and that it represented the base for many other complex correlated concepts. As a result, a comparison between the definition of *minority* and *indigenous peoples* was purposely included in Part I Chapter 1, so that some preliminary terminological issues could be clarified before starting the main analysis.

It was exactly on the notion of *indigenusness* that one of the measures of reparation is based, or better, of the notion of *indigenusness* combined with the notion of *ancestral*. This adjective is deeply rooted in the very concept of indigenous peoples, since it represents the core of their spiritual conception of territoriality and their devotion to Mother Earth. As seen in the previous chapters, this inherent feature belonging to the indigenous land, proved by historical factors, is indeed the reason for one of the main reparation methods adopted by the major international documents for the benefit of the ethnic groups: restitution. As already widely discussed in the previous chapters, reparations can assume a different nature –spiritual, social, moral, economic- according to the case and the role of the concrete good or benefit that need to be restored. I believe that (at least) a certain degree of ownership regarding the ancestral land on the indigenous populations that have inhabited for centuries is undeniable. For its spiritual and religious nature, it can only be morally and humanly just and fair to recognise such a right to the indigenous peoples. A widespread opinion in some international environments still considers this kind of restitution as “outdate” or useless, since the violation at its base occurred too much time ago, barely showing any consequences in the present time. Personally, I still think that violations never lose their negative connotation, regardless of place and time. Thus, they call for a fair and just measure to restore the pre-existing situation or, if not possible, to at least provide a balanced compensation for the loss incurred. We know that most of the time, a total restoration of the exact pre-existing situation is not feasible; however, states, organisation and

authorities should not let the complexity of such a sensitive situation prevent them from pursuing justice and fairness, in any case.

At the same time, heated debates inside and outside the national borders of many states still witness the controversial opinions surrounding the ratification of certain fundamental documents concerning human rights. For instance, the (in)famous *ILO Convention No 169* still faces scepticism in its ratification history, since many states with a certain relevance in the international scene (among which are some Nordic states) have not agreed on adopting it yet. The reasons can vary –slow bureaucratic procedures, other pressing national emergencies, impossibility in reaching a total agreement on the content of the document- but I believe it would be of the utmost importance that more states put their best efforts in agreeing on a compromise that would benefit the actual victims in the first place, the indigenous communities. At the same time, we have seen how the *ILO Convention No 169* resumes the anachronistic paternalistic approach contained in the *ILO Convention No 170* whose roots are to be traced in the colonial period, and that unfortunately are still shared by many. This obsolete point of view may be justifiable when it was considered right for the first time, but the recent events show that it is of no use nowadays: the indigenous populations do not need any systematic and action of states aimed at protecting their integrity and their cultural heritage. On the contrary, this could actually reveal itself as a detrimental measure for the indigenous communities, as Mazza claims <sup>245</sup> : by receiving intergovernmental fund transfers provided by the central authorities in their attempt to sustain the indigenous groups' internal economy, these communities would not have the possibility to escape the vicious circle of financial dependence. Funds supporting the indigenous communities should therefore be carefully allocated after in-depth analysis of the economic situation of said ethnic groups.

Another fundamental point is represented by the better diffusion of the knowledge on the international tools that the indigenous peoples can use to protect their individual and collective entitlements. The effective and concrete implementation of international provisions on human rights -among which are the indigenous rights- are in the first

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<sup>245</sup> Mazza, Mauro. "Percorsi di ricerca sul diritto polare", *Quaderni*, pg 164. Dipartimento di Scienze Politiche "Alberico da Rosciate", Facoltà di Giurisprudenza, Università degli Studi di Bergamo. Jovene Editore, Napoli. 2011

place the nation-states' duty. Shall this not be enough, the single groups must be given the possibility to address the competent representatives and take legal action on a jurisdictional and quasi-judicial level, both internal and external, in order to claim the full and objective compliance of the binding international human rights provisions.

Fierce debates have increased their presence, especially in the last decades, on a heated issue: environmental sustainability and natural resources endangered status. Mauro Mazza again spends a few words on this topic in his "Percorsi di ricerca sul diritto polare"<sup>246</sup>, mentioning the claims on the land that the indigenous peoples have to face on a daily basis. According to the author, currently all the major multinational oil corporations are conducting tests in the Nordic territories to verify the level of monetary profit that such a business may bring to the national treasuries. Even more surprisingly, the Nordic states themselves are investing in this kind of activities within their own borders (in Hammerfast, northern Norway; in the Kola peninsula; in Spitzbergen, Norway<sup>247</sup>). The neighbouring countries also cause concern, due to their growing interest in expanding their area of influence on the Nordic states in order to benefit from the northern states' abundant resources, of land and sea. Canada, United States, Russia, and Denmark have already carried out political moves to measure the continental shelf, in view of a potential stretching of their national borders in case of further melting of the glaciers.

As imagined, another natural resource connected to the marine field and involved in the exploitation business is the abundant quantity of fishes and crabs. Many wild animals (seals, sea lions, polar bears) have been emigrating and changing their hunting zone because of the ice layer narrowing, resulting in a crescent risk of extinction in their detriment. Despite the growth of demands for global measures to contrast the environmental changes that planet Earth is suffering, the situation shows no remarkable signs of improvement. Here the *indigeness* of the ethnic minorities would come into play, as their ancestral knowledge represents one of the solutions highly suggested by pro-indigenous associations: the knowledge on the traditional territory resources and

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<sup>246</sup> Mazza, Mauro. "Percorsi di ricerca sul diritto polare", *Quaderni*, pg 169. Dipartimento di Scienze Politiche "Alberico da Rosciate", Facoltà di Giurisprudenza, Università degli Studi di Bergamo. Jovene Editore, Napoli. 2011

<sup>247</sup> Here a research centre was established by the Chinese government, regularly visited by Chinese research vessels.

on the environmental care shared and transmitted through generations by the populations that have been peacefully living in this lands for centuries could end revealing themselves as the key factor to turn the tables of the environmental match towards more positive results.

To take into account the national emergencies mentioned before, arguably the case of the refugees is the most heated current matter with a global resonance. Contrary to what it may seem at first, the controversy directly involves the indigenous peoples since the plethora of people arriving from the Middle East and entering the Scandinavian states are “forcing Northern European countries to look to a heterogeneous population as they welcome the refugees”<sup>248</sup>. Discrimination still is a topic not adequately addressed and highly underrated in the Scandinavian countries, which raises once again with new strength the issue of the human rights implementation with a special focus on the minorities. Both can be considered as national emergencies that need to be addressed in the shortest time possible, but concrete action cannot but be difficult to achieve when human rights are jeopardized on multiple levels.

Letting national emergencies and legal actions aside, what should be really kept into consideration is the moral dimension extending beyond the egoistic self-centred aims of multinational corporations and national governments. As the quotation I included at the beginning of this chapter reads, “The honourable way *forward* is to *respect*, not denigrate, cultural differences”: the only way to obtain a concrete improvement for the indigenous peoples would be to look towards the future measures and approaches that can be adopted. With a scrupulous eye for respecting and embracing cultural diversity, instead of denigrating and discriminating what is different from us, multiculturalism would be seen as an added value and a precious resource, instead of a hindrance and a source of hate and conflicts.

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<sup>248</sup> From *Prospect – Journal of International Affairs at UCSD*. “The Sami: A Disappearing Indigenous Minority in Scandinavia”. By Omkar Mahajan. October, 31 2106. Available at <https://prospectjournal.org/2016/10/31/the-sami-a-disappearing-indigenous-minority-in-scandinavia/> .



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